No. 6405

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon

HON. R. S. BEAN, JUDGE

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APPELLEE'S CONTENTIONS

May be thus summarized:

First. That, upon the undisputed facts disclosed by the affidavits supporting the motion, it was within the sound discretion of the lower court to dismiss this ac-

tion, brought in Oregon by an alien resident of Germany against a New York corporation, upon an insurance contract issued in Germany, in the German language, subject to German law, payable and otherwise performable in Germany, and both parties to the action being subject to the jurisdiction of the courts and other tribunals of Germany;

Second. That the venue stipulation in the policies, specifying certain German courts as having exclusive jurisdiction of all disputes arising thereon, were made pursuant to German law, are fair and reasonable and should be given effect;

Third. That the appellee and all its assets located in Germany are under the supervision of the German government, and the rights and remedies which appellee is required to give, and to which the appellant and all other holders of German insurance policies are entitled, under German currency and valorization laws and decrees, are special and administrative in character and are not such as the American courts are competent to administer.

STATEMENT

This action was brought in the Circuit Court of Multnomah County, Oregon, and was removed by the appellee to the Federal Court. The original complaint (Trans. Rec. 2-a) and the amended complaint (Trans. Rec. 88) set up three causes of action, each based on an insurance policy issued in Germany to a German citizen, written in the German language and payable in Germany in the currency of that country. A copy of one of the policies is attached to the answer (Ex. 1, Trans. Rec. 54). The complaint alleges that the other two policies are identical except as to policy numbers (Trans. Rec. 91-93). In each of the causes of action appellant seeks to recover alleged cash surrender values. The reply filed seems to be drawn on the theory that appellant is entitled to a general accounting from the appellee (Trans. Rec. 120-126).

An answer was filed denying liability; setting up the stipulation in each policy designating certain specified German courts as having exclusive jurisdiction; pleading novation in that that Kronos Deutsche Leben-Versicherungs Aktien-Gesellschaft, referred to in the record as "Kronos", assumed the liability of the appellee under the policies, upon an agreement assented to by the appellant, that appellee should be released from liability; pleading the currency legislation of Germany, both before and after the war; the valorization laws, the steps taken by the German authorities to valorize or rate up certain classes of contracts payable in marks, including

insurance policies issued by the appellee in Germany; the agreement reached between the appellee on one hand and the German insurance authorities representing the German policyholders on the other, by which a valorization fund was established and placed in the custody of the German insurance authorities to pay and adjust all claims on policies issued by the appellee in Germany, including the policies involved in this case; and other matters (Trans. Rec. 8).

The appellee moved (Trans. Rec. 147):

> "For an order dismissing this action, and each cause of action stated in the amended complaint for lack of jurisdiction of the subject matter thereof, or, in the alternative, that the court in the exercise of its discretion decline to accept and retain jurisdiction of this action and dismiss the same."

This motion was based on the pleadings and records, and upon the following:

(a) Affidavit of Dr. Arthur Burchard (Trans. Rec. 148) and Exhibits "A" to "Z", inclusive, attached thereto (Trans. Rec. 215-414), consisting of copies of German laws and decisions of the German courts and the German Federal Insurance Board for Private Insurance;

(b) Supplemental affidavit of Dr. Burchard (Trans. Rec. 502) and Exhibit "A" attached thereto

(Trans. Rec. 508), being a decision of the German Supreme Court rendered May 27, 1930;

(c) Affidavit of Walker Buckner (Trans. Rec. 445) and Exhibit "A" (Trans. Rec. 479) attached thereto, being a decision of the German Federal Insurance Board rendered February 12, 1930, fixing the amount of the contribution appellee should make to the valorization fund for the payment of all policies issued by appellee in Germany; Exhibit "B" (Trans. Rec. 493) attached thereto, which is the distribution plan established by the German Federal Insurance Board for the insurance policies issued by the appellee in accordance with the German valorization laws, and Exhibit "C" (Trans. Rec. 498), which is a table of the percentages of the gold mark value at which the policies of the various companies are to be rated up or valued. Something like fifty companies are listed, among which is the appellee (Trans. Rec. 500);

(d) Affidavit of A. E. Clark, one of the attorneys of record for the appellee (Trans. Rec. 432), and Exhibit "A" (Trans. Rec. 440) thereto attached, which is a copy of the agreement under which certain persons represent and have agreed to prosecute litigation in behalf of various German policyholders, and to receive a proportion of the recovery for their services and outlays;

(e) Supplemental affidavit of A. E. Clark (Trans. Rec. 526) and Exhibits 1, 2, 3 and 4 attached thereto, to which reference will be hereafter made.

Affidavit of Richard Kruse and exhibits attached thereto, which have been omitted from the record on appeal for the reason that the affidavit simply stated that the exhibits attached to it were true copies of the policies of insurance issued to appellant. Inasmuch as a copy of one policy was attached to the answer and the others were similar, the Kruse affidavit was merely repetitious.

Dr. Arthur Burchard is a distinguished German lawyer and jurist (Trans. Rec. 148). Mr. Walker Buckner is vice-president of appellee, and for many years prior to 1915 was stationed in Europe in charge of its European business. Upon his return to America he remained in charge of the European business, and in 1928, 1929 and 1930 conducted for appellee the conferences with the German Insurance Board with regard to the fund to be, and which was, provided by the appellee under the valorization laws of Germany to liquidate all policies issued by the appellee to citizens of Germany (Trans. Rec. 445).

These affidavits stand admitted. Nothing contained in them or in the exhibits attached thereto was denied or contradicted by affidavits filed in behalf of the appellant or otherwise.

Two affidavits were filed by appellant in opposition to the motion. One is the affidavit of Mr. Peter A. Schwabe, of Portland, associated in the law business with Mr. C. T. Haas, one of the attorneys for the ap-

pellant. He merely averred that certain exhibits attached to his affidavit were correct translations into English from the German language (Trans. Rec. 543). The exhibits attached to his affidavit are Exhibit "A", a brief statement of the business of the appellee in Germany for 1914, made up at the Berlin office; Exhibit "B", a circular letter sent out with the copy of said statement from the Berlin office; Exhibit "C", what appears to be a circular letter sent out from the Berlin office in March, 1917, and Exhibit "D", circular sent to German policyholders from the German office in March, 1918. The other affidavit filed by the appellant was that of Mr. C. T. Haas (Trans. Rec. 552). It recites that he understod that the documents referred to in the affidavit of Mr. Schwabe were sent out to German policyholders, then refers to a decision of the Supreme Court of Oregon, also decision of the Supreme Court of the United States which apparently held that the New York courts were within their rights in declining to entertain jurisdiction of a controversy between non-residents on a cause of action arising elsewhere, quotes from certain sections of the New York Code of Civil Procedure, and mentions some other matters which neither directly nor indirectly challenge anything contained in the affidavits filed by appellee.

The practice followed in bringing the matters contained in the motion and affidavits to the attention of the court was not questioned; the motion was heard upon the merits. It was stipulated that the affidavits used in

this case, both in support of and in opposition to the motion, should be considered as a part of the record in the case of Hermann versus New York Life Insurance Company, now on the docket of this court as No. 6406.

Each policy involved in this case was issued at the Berlin office (Trans. Rec. 54). Mr. G. Nimptach, general representative of appellee in Germany, and Mr. Schlesier, secretary for Germany of appellee, personally signed the policies in Berlin and these were the last signatures affixed. The policies were written entirely in the German language and were delivered to the insured in Germany. All premiums were payable in German currency at the Berlin office and all amounts payable to the insured or other beneficiary under the policies were also payable at the Berlin office (Trans. Rec. 446, 447). Each policy provided that it should take effect only after delivery to the insured (Trans. Rec. 56) and that all authority with respect thereto was to be exercised by the chief representative of the appellee for Germany (Trans. Rec. 57). At the time the policies were issued appellant was a resident in and subject of the German Empire and has since continued to reside in Germany (Trans. Rec. 447).

Mr. Buckner further states in his affidavit (Trans. Rec. 451):

> "The defendant is organized under the laws of the State of New York, where it has its principal office and place of business. There are no witnesses to any of the transactions involved in

this action resident in the State of Oregon. Practically all of the witnesses thereto reside in Germany and those who do not reside in Germany, are residents of the State of New York. None of the records of the defendant relating to any of said transactions is, or ever has been, in the State of Oregon. All of defendants' original data, correspondence and documents relating to defendant's business in Germany and policies issued there were kept in Germany and are still in Germany in the possession of the 'Kronos' Life Insurance Company, hereinafter referred to, except when defendant is able to obtain them for use in connection with litigation in America upon said German policies. To defend this action in the courts of Oregon would impose upon the defendant great and unnecessary difficulty, inconvenience and expense."

Thus it appears that the appellant is a non-resident alien, a resident and citizen of Germany. The appellee is a non-resident, a New York corporation, having its principal office in the State of New York. The causes of action, if any exist, arose seven or eight thousand miles from Oregon, in a foreign country, having a different language, different laws, and a different system of jurisprudence. These causes have been imported into Oregon without apparent reason or excuse. The appellant is not physically here, but in Germany. None of his witnesses is here. There are no witnesses to any of the transactions here involved resident in the State of Oregon. The situs of every fact connected with the

insurance is in Germany except the facts that the appellee has its home office in New York and that this action is brought in Oregon. None of the records relating to any of the transactions involved is, or ever has been, in the State of Oregon. Practically all of the appellee's original data and correspondence and documents relating to the policies in this action and all of the other German policies were kept in Germany and are still there.

Consideration of the foregoing facts makes pertinent the remark made in an action brought in a Scottish court on behalf of some English underwriters, against a French steamship company on a contract entered into in France, written in the French language and relating to transactions there occurring. The trial court declined to retain jurisdiction and remitted the plaintiff to the courts of France. The House of Lords sustained the dismissal, the Lord Chancellor remarking:

> "From the beginning to the end of the case there is not a breath of Scottish atmosphere."
>
> *Societie du Gaz vs. Les Armateurs Francais,* H. C. 13 (1926 Sess. Cas.).

So in this case, from the beginning to the end there is not a breath of Oregon atmosphere.

Mr. Buckner states (Trans. Rec. 449-451):

> "At all times since 1904 defendant has maintained and now maintains and intends to continue to maintain in Germany a general repre-

sentative and attorney-in-fact appointed pursuant to the aforesaid §115 of said laws of Germany Relating to Private Insurance Enterprises (Trans. Rec. 75-85) and upon whom process issued out of any of the courts of Germany and directed to defendant might be served. During the past few years many hundreds of actions have been commenced in Germany against defendant upon mark policies issued by defendant in Germany. In substantially all of those actions service of process has been made upon the defendant's general representative and attorney-in-fact in Germany. In no action commenced in Germany on a mark policy issued in Germany has defendant sought to evade the jurisdiction of the German courts or to invalidate service made in Germany upon defendant's said representative in Germany. In all of said actions, i. e., upon mark policies issued by the defendant in Germany, the German courts have assumed jurisdiction (so far as any justiciable issue was presented therein) and those actions have either been disposed of or are still pending in the German courts.

* * * * *

"The courts of Germany have at all times been, and now are, open and functioning, competent and ready to take jurisdiction of any justiciable controversy based upon or arising out of the policies upon which this action is based, or based upon or arising out of any and all policies issued by the defendant in Germany."

Copies of the decrees and judgments of the German

courts and other tribunals, attached as exhibits to the affidavit and supplemental affidavit of Dr. Arthur Burchard, and the affidavit of Mr. Buckner, disclose that within the past two or three years the appellee has been before the German courts and tribunals in various matters. Exhibit "K", attached to the affidavit of Dr. Burchard (Trans. Rec. 258) is a decision of the German Insurance Board under date of October 25, 1928. The appellee appeared in the proceeding, which was to determine whether appellee was a supervised company within the meaning of the valorization laws. It was held to be a supervised company and therefore subject to the valorization laws. The decision recites the activities of appellee in Germany, names various general agents who from time to time were appointed, up to and including Julius Kahn, of Frankfort, appointed May 19, 1928; refers to the fact that appellee sought to withdraw from Germany and cancel the power of attorney to its general representative in 1924, but, this action being protested by the German Insurance authorities, it was withdrawn, and it was pointed out that under the German Insurance law the power of attorney and the authority of the general representative, once appointed, could not be terminated without the consent of the German government, which was never given (Trans. Rec. 258, 259, 260, 261). Exhibit "L", attached to the affidavit of Dr. Burchard (Trans. Rec. 272), is the decision of the Appellate Division rendered February 13, 1929, affirming said decision of the German Insurance Board of October 25, 1928, supra. Again the appellee was

present. The Appellate Division reviewed the history of the activities of the defendant, pointed out that it was then, and at all times theretofore had been, under the supervision of the German Insurance Board, that it then had an office and general representative or attorney in fact in Germany, referred to the fact that appellee had large assets in Germany in addition to those transferred to Kronos, and remarked:

> "As the court below expressly stated, the company always fulfilled every order of the German Insurance Board." (Trans. Rec. 280.)

Exhibit "O", attached to the affidavit of Dr. Burchard (Trans. Rec. 298) is a decision by the Supreme Court of Germany under date of March 12, 1930, in the case of Messerschmitt against the defendant. It is there stated that the appellee at the time of the hearing in March of 1930 had its principal branch or office in Germany at Frankfort, and that among those representing it on the hearing was its chief agent for Germany.

So it appears that appellee is in Germany, that under the German insurance laws it was required to and did elect a legal domicile in Germany, as to all German business; that it is subject to the processes of its courts, that it is under the supervision of the German Insurance Board and is meeting all orders of that Board and the requirements of the valorization laws of Germany relating to the policies involved in this action and all other policies issued by appellee to German nationals, and that not only has it made all the contributions

which the German government has exacted to meet the requirements of the valorization laws, but it also owns in Germany large additional assets.

The affidavit of A. E. Clark (Trans. Rec. 432) discloses that there are now pending in the District Court of the United States, for the District of Oregon, against appellee a number of cases, involving 192 policies, issued to German citizens who now reside, and at all times have resided, in Germany, written in the German language, payable in Germany in German currency, and subject to German law. There are also pending in the same court, against the Guardian Life Insurance Company, cases involving fifty policies. There are pending in the Circuit Court of the State of Oregon, for Multnomah County, against appellee and the Guardian Life Insurance Company, cases involving eighteen policies.

Paul Hermann, of Heidelberg, Germany, is plaintiff in many of these cases. For instance, in the case of Hermann versus appellee, No. L-10489, pending in the District Court of the United States, there are involved 115 policies and 115 separate causes of action. There is another case brought by him, involving 39 policies issued to different persons, another one involving 14 policies, and others a less number.

It might be interesting to inquire why these litigations were exported from Germany and imported to Oregon.

Before any cases were brought in Oregon on these

German insurance policies, two cases were brought against the appellee in its home state, New York, on policies issued in Germany under circumstances common to all of the German policies. The New York courts on motion declined to retain jurisdiction and dismissed the actions. We will later refer more at length to these two cases, the Higgins case and the Von Nissen-Stone case. After the New York courts had declined to retain jurisdiction of these actions, Oregon for some reason was selected as the field for the next attempt to foist on the American courts many thousands of cases on German policies, not because the German policyholders could not get a hearing or get justice in the tribunals of their own country, but undoubtedly because they hoped that the American courts might be led, or misled, into giving them much more than they could obtain in their own courts, under the laws of their own country.

For several years a vigorous campaign has been carried on in Germany by divers persons to secure control and representation of claims on policies issued in Germany by American companies, for prosecution in the American courts, upon the representations that a much larger recovery might be had in the American courts than from German courts or German administrative bodies.

Mr. Buckner in his affidavit states that prior to the beginning of the World War four large American life insurance companies transacted business in Germany, viz., the Guardian Life (formerly Germania), the Mu-

tual Life, the Equitable Life, and appellee. He also states that there are outstanding about twenty-eight thousand policies issued in Germany by these companies, including appellee, to German citizens, payable in German marks, and subject to valorization under German law. He then continues (Trans. Rec. 465):

> "For several years last past there has been conducted, and is still being conducted in Germany, by attorneys and associations of present and/or former policyholders of said four insurance companies, a vigorous campaign to secure control and/or representation of said policies of insurance for the purpose of commencing proceedings before the courts of Oregon and other states, for the purpose of endeavoring to recover judgments upon those policies in American courts or to harass defendant and said other insurance companies sufficiently to secure a settlement of such claims. Pursuant to this campaign many policies of insurance issued by the defendant in Germany and payable in marks have been assigned to various persons for the purpose of bringing actions in the American courts, and particularly have many assignments been made to Paul Herrmann, a citizen and resident of Germany, who has already brought actions in the courts of Oregon as alleged assignee upon a large number of policies issued by the defendant in Germany to German citizens, and payable in German marks. I am informed and believe and therefore aver that under the terms upon which said claims are solicited for prosecution in American courts, and under the terms of said assign-

ments, it is provided that attorneys prosecuting such claims before American courts shall take and prosecute said suits and actions only upon a contingent fee basis. Said claims have been obtained for prosecution in American courts upon statements and representations that a much larger recovery can possibly be had in the American courts than from German courts or German administrative bodies."

Mr. Buckner also refers to the two cases brought in New York against appellee and which were dismissed upon motion supported by affidavits similar to those in the case at bar (Trans. Rec. 466).

Attached to the affidavit of A. E. Clark (Trans. Rec. 440) is the power of attorney under which these German litigations are being promoted and carried on.

The power of attorney runs to Transatlantic Estates & Credit Company, Inc., of New York City, Joseph Woerndle of New York City, C. T. Haas of Portland, and Paul Hermann of Heidelberg, Germany, or either of them. The corporation and individuals so designated are given plenary powers to compromise and settle any claims in any manner or for any amount they may determine, prosecute any suit at law or in equity, assign or make any other disposition of the claim, and it is provided that (Trans. Rec. 443):

"In consideration of the sum of One Dollar and/or its equivalent to me in hand paid, the receipt of which is hereby acknowledged, and of other good and valuable considerations and of

> the services performed and to be performed, and for and in consideration of money expended, and to be expended, in an endeavor to secure a refund on said above described policy, I hereby grant, sell, assign and transfer to Transatlantic Estates & Credit Company, Inc., of New York City, and/or Joseph Woerndle of New York, N. Y., or C. T. Haas of Portland, Oregon, and/or Paul Hermann of Heidelberg, Germany, its, his or their agent, in absolute ownership, an undivided twenty-five % or interest in and to all my right, title and interest in and to above described policy and in and to any right for refund," etc.

This action, and all of the other actions brought in Oregon upon German insurance policies, appear to be speculative enterprises in which the policyholder invests nothing. He is over in Germany, within the protection of the courts and laws of his own country, and, no doubt, feels certain that he can obtain all that German law will give him regardless of the action of the American courts. If the American courts should be persuaded to retain jurisdiction and give him more than he is entitled to under German law, so much the better for him and for his attorneys in fact who have entered into the speculation with him. If the American courts should deny him any relief, indeed, should even hold that he had no claim against the appellee, either under German or American law, his rights under German law would be in no wise impaired, because the German courts have held that, in view of the venue provisions in the insurance policies and the provisions of the valori-

zation laws setting up elaborate administrative machinery for the settlement of insurance policy contracts, no tribunals other than German are competent to take jurisdiction of or determine any controversy arising out of such insurance contracts.

The German Federal Insurance Department in its decision of February 12, 1930, a copy of which is attached to the affidavit of Mr. Buckner as Exhibit "A" (Trans. Rec. 479-491), took cognizance of the propaganda carried on by divers persons and associations throughout Germany to secure representation of German policy claims for prosecution in this country and referred to the "success honorary" which the promoters hoped to earn. It was in this decision that the German Insurance Department set down the terms of the agreement between the defendant, the German Insurance Department and the Trustee appointed under the German valorization laws to represent all policyholders, under which a large contribution was made by appellee to the valorization fund in accordance with the requirements of German law, for distribution ratably among policyholders. The German Insurance Board, in that decision, among other things, said (Trans. Rec. 491):

> "In any case, in the verbal negotiations, which took place between the Trustee, several members of the Insurance Department and the vice-president of the company, Mr. Buckner, a result was reached which must be termed acceptable and serviceable to the interests of the insured. It is true that it remains behind the high expectations

of the insured, who were pitched up by the active propaganda of the associations, which latter—this only a by-the-way remark—had conditioned for themselves quite a considerable 'success-honorary', but it anyhow reached and even exceeds the revaluation quota which these associations had originally declared sufficient. The quota assessed by the Senate corresponds with and in many instances even exceeds the revaluation rates of a number of the German companies. It burdens the 'New York', whose revaluation stock is exceedingly low in consequence of its having invested its premium reserves exclusively in bonds, with a considerable sacrifice. Besides, the contribution, which the 'New York' has in this manner to pay, exceeds, in respect to amount, by many million Reichsmark the amounts fixed so far for domestic and foreign insurance enterprises. In considering the proportion between the existing revaluation stock and the payment with which the company gets charged by the assessed contribution, one can but term the result a favorable one. The so far existing revaluation stock made a revaluation of at most only 1.8% of the goldmark reserve possible. By the contribution which the company has to pay the revaluation rate gets increased more than seven-fold.

"Although the free resolution of the Senate was not interfered with by the position taken by the American supervising authority, the declaration of the 'New York' could not remain unnoticed, that larger payments would not be compatible with the interest of the totality of its in-

sured and would not be tolerated by the American supervising authority.

There is another phase of this litigation to which we invite the attention of the court. Pending in the Circuit Court of the State of Oregon, for Multnomah County, is an action brought against appellee by one Luetjohann, a citizen and resident of Germany, on a German insurance policy. Substantially the same issues of law and fact that are involved in that case as are involved in the case at bar and in all of the other German insurance cases (Trans. Rec. 528). It appears from the Supplemental Affidavit of A. E. Clark, and the exhibits annexed, that a motion has been filed in that case requiring appellee to bring to Portland, and there submit to inspection by counsel for Luetjohann, who also represents all the plaintiffs in various actions brought on German policies:

> "All of the day books, journals and ledgers kept by defendant during the years 1922 to 1928, whether in book form or otherwise and
>
> "All balance sheets and trial balances;
>
> "Also all lists, registers and other records containing the names of all policyholders and the amounts and kinds of insurance issued and in effect during said years;
>
> "All other books, papers, documents and records in the possession of defendant which disclose the amount of profits made each of said years by defendant and which disclose the present whereabouts, amount and situs of the assets and surplus of the defendant and the investments thereof;

> "All books of account, papers, documents and records in the possession of the defendant which disclose the unit value, i. e., American dollars or other units, in which the profits, surpluses and assets of the defendant were earned by defendant and were kept during said years and are now kept and figured and calculated in said books of accounts." (Trans. Rec. 534.)

An affidavit was made by Mr. Haas in support of this motion, averring that all of the books, records, etc., requested were necessary to the preparation and prosecution of the case.

Mr. MacFarlane, vice-president and actuary of the appellee, filed an affidavit (Trans. Rec. 538) in opposition, in which, among other things, he stated that the books and records demanded by plaintiff in the case comprised hundreds of volumes of current books, that the company had outstanding during the period covered by the request more than two million, five hundred thousand policies, and that these records were in daily use by hundreds of accountants, actuaries and other employees of appellee, making loans, computing dividends, converting policies, answering inquiries, etc., and to comply with the request would disrupt all of the departments and practically stop the company's operations. He estimated it would take a great many fully loaded freight cars to carry the records in question.

Upon the undisputed facts disclosed by the affidavits supporting the motion to dismiss, it was within the sound discretion of the Trial Court to decline to retain jurisdiction and dismiss the action.

It seems to be the contention of counsel for appellant that in obedience to constitutional and statutory mandates the Federal Court must retain jurisdiction and proceed to judgment in every action if transitory in form tested alone by the allegations of the complaint brought by a non-resident alien against any citizen, natural or corporate, without regard to where the cause of action arose, the real nature of the action, where witnesses live or other evidence may be found, or what rights or remedies are given under the laws of the country where the cause of action arose.

There are involved in these actions important questions regarding the existence and interpretation of German laws and the decisions of German courts and administrative tribunals. These are not found in the libraries of Oregon. If they were they would not be understandable in their original form except by persons thoroughly familiar with the German language, particularly with German legal terminology, and deeply learned in the German law. Translations may be obtained with great labor and difficulty. Translators seldom agree. Agreements between legal experts as to the laws of a foreign country are still more infrequent. There are obvious difficulties in translating into the language of one country the laws and judicial decisions

of another, having a different language, system of jurisprudence and historical background.

It is our contention that the courts of Oregon, state and federal, have the power to and will protect themselves against a deluge of alien litigation upon causes of action between non-residents, arising in a foreign country. The courts of this country and of Great Britain have frequently used this discretionary power. The power which the court exercises in declining to retain jurisdiction of a cause, as a matter of discretion, is judicial. It has been said to be inherent. It has been suggested, although not directly decided, that it is a power which the legislature may not wholly take away.

A non-resident alien, so the reasoning runs in the decisions, has no absolute right to bring his cause of action arising elsewhere, into the federal or local courts of any state. The courts may permit him to do so as a matter of comity. Many considerations have influenced the courts in declining to retain jurisdiction. Among those most frequently mentioned by the courts are:

(a) That a given cause may be more conveniently tried and with less expense to litigants where it arose, the courts of that place being open, functioning and competent to try the cause;

(b) That without apparent reason or cause a citizen of another state or nation ignores and passes by his own courts, which are competent to adjudicate his rights, and

imports his cause to the courts of a distant state or country;

(c) That because of the distance from the place where the cause of action arose, the difficulties attending upon a judicial investigation, the fact that the court might be called upon to deal with foreign laws and contracts written in a foreign language, it would not be easy to dispense justice, or for the court to have any assurance that it is, in fact, enforcing the right of action given by the legis loci;

(d) That the courts of a state are primarily set up for the benefit and convenience of its own citizens, and those having business within its jurisdiction, and should not be put to the expense, and burdened with the trial, of controversies arising elsewhere and imported into the jurisdiction by non-residents;

(e) That an alien litigant comnig into our courts had contracted to submit the controversy to some designated foreign court; and

(f) That a court should not undertake to adjudicate rights originating in another country, under laws, statutory and otherwise, differing materially from the laws of the forum, and especially where these laws are written in a foreign language unfamiliar to the courts of the forum, and the rights and remedies given by foreign laws are such as the court of the forum may find it difficult, if not impossible, to administer.

Before taking up the discussion of the contentions made by counsel for appellant and a review of the federal decisions and those of various state courts, applying the doctrine of discretion to alien litigation, we wish to refer to two cases brought by German policyholders against the appellee in the courts of New York, its home state, and in which the New York courts declined to retain jurisdiction and entered judgments of dismissal upon a showing by affidavits of facts substantially like those before the court in the case at bar.

On November 27, 1925, Von Neissen-Stone brought an action in New York against appellee upon an insurance policy issued in Germany and payable in German marks. The insured died before the action was commenced. Plaintiff, the widow of the deceased, was beneficiary. A motion was made similar to the one now before this court. It was heard before Judge Koch, of the New York Supreme Court, who overruled it, expressing the view that he could only consider the complaint in determining whether or not jurisdiction should be retained, and that the matters set up by affidavit should be set up by answer. From this order an appeal was taken by appellee to the Appellate Division. While this appeal was pending and on December 1, 1925, another like case, entitled Higgins versus New York Life Insurance Company, was begun in New York. Higgins was a resident of New York and was assignee of a policy issued to one Peters, who was born a German subject but became a citizen of the United States before the pol-

icy was issued. However, the policy was issued in Germany, was there payable in German marks and was issued to Peters while he was residing in Germany as an employee of a German steamship company. A motion was made in the case similar to that made in the Von Neissen-Stone case. Judge Lyndon, of the New York Supreme Court, dismissed it with an opinion from which the following is quoted:

> "Upon all the allegations in the papers before me I think the court should refuse to take jurisdiction of the subject matter of this action. Motion to dismiss the complaint is granted."

Higgins appealed to the Appellate Division, and on May 28, 1927, the order dismissing his case was affirmed by the Appellate Division without opinion, all five members of the court concurring (220 App. Div. 760), 222 N. Y. S. 819. On June 30, 1927, the order in the Von Neissen-Stone case, denying the motion to dismiss, was reversed and the case dismissed without opinion on the authority of the Higgins case. These cases were not taken to the Court of Appeals.

It was after these cases were dismissed in New York, and on October 3, 1927, that the first of the German insurance cases was commenced in Oregon.

We have, and made available to the lower court, the printed records in the Higgins case and in the Von Nissen-Stone case, containing all the pleadings, affidavits, etc., and will make them available to this court if desired.

The Von Nissen-Stone and the Higgins cases are referred to in the affidavit of Mr. Buckner (Trans. Rec. 466) and in the opinion of Judge Bean (Trans. Rec. 564), 45 Fed. (2nd) 426. Substantially the same question came before Judge Tucker, of the Circuit Court of Multnomah County, Oregon, in the case of Kahn versus appellee on demurrer by Kahn to a plea in abatement filed by appellee, and he reached the same conclusion as that reached by Judge Bean. Concerning the opinion of Judge Tucker, Judge Bean said (Trans. Rec. 565):

> "Judge Tucker, in the State Court of Multnomah County, in an able and well-considered opinion in a case brought on one of the German policies (Kahn v. New York) reached the same conclusion."

Counsel for appellant suggest that because appellee removed this case from the state court it stands in a different situation than if the case had been originally brought in the federal court. The answer to this may be found in Section 81, Title 28, U. S. Code, which reads:

> "The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal."

Counsel for appellant assert that he has a constitutional right to have the court hear and determine his

cause, and this assertion is based upon Article 3, Section 2 of the Federal Constitution. It is not generally supposed that non-resident aliens have any personal constitutional rights. However that may be, in *Kline v. Burke Construction Co.,* 260 U. S. 226, 233, 67 L. Ed. 226, 231, the court held that the right of a litigant to maintain an action in a Federal court on the ground of diversity of citizenship (P. 231):

> "Is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. * * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."

Joined with the claim that appellant has a constitutional right to have his cause determined is the further claim that Section 41 of the Judicial Code inflexibly imposed upon the lower court the duty to hear and determine the cause and deprived it of any discretion in the matter.

Section 41, Title 28, U. S. Code, reads in part as follows:

> "The District Court shall have original jurisdiction as follows:
>
> "(1) First. Of all suits of a civil nature, at common law or in equity * * * between citizens of a state and foreign states, citizens and subjects.

"(2) * * *

"(3) Third. Of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy," etc.

It will be observed that the District Courts are given original jurisdiction of all civil causes of admiralty and maritime jurisdiction as fully and to the same extent as they are of other civil suits. The Federal Courts time without number have declined to retain jurisdiction of admiralty suits when in the discretion of the court it appeared to be inconvenient or inexpedient to retain jurisdiction. These provisions of the Judicial Code vest the District Courts with power to take jurisdiction of and try the various classes of cases enumerated. They do not interfere with or undertake to limit the discretionary power of the court to decline to retain jurisdiction of a cause, as, for instance, one brought by an non-resident alien on a cause of action arising in a foreign country when it appears that it would be inexpedient or inconvenient to do so, where the foreign laws are of doubtful meaning, and the rights and remedies of the parties may be difficult of ascertainment and beyond the powers of the court adequately to administer.

The opinion of the late Judge Bean, sustaining the motion to dismiss, is in the record (Trans. Rec. 560), 45 Fed. (2nd) 426. His remarkably clear, terse statement of the questions involved shows that he made a careful study of the whole record. He points out that it would no doubt consume many months' time of the court to try and dis-

pose of the German insurance cases then pending, disrupting the ordinary calendar and resulting in delay, inconvenience and expense to other litigants entitled to invoke the jurisdiction of the court. And, further said Judge Bean:

> "It is apparent that the plaintiffs are seeking by these actions to impose on the defendants a liability under a different rule than 'that under which the parties dealt'.
>
> "The courts of Germany have ruled that any person seeking to recover on a civil contract made in Germany prior to August, 1924, and payable in marks, can only recover on the basis provided in the monetary law of 1924. Manifestly the plaintiffs are not proceeding on any such theory."

Answering the contention of appellant that because the court had jurisdiction of the subject matter and the parties it had no discretion but must proceed with the cause, Judge Bean said (Tr. p. 563):

> "It is argued by the plaintiffs that because the court has jurisdiction of the subject matter and the parties, it has no discretion but should proceed with the case regardless of where the cause of action arose, or the law by which it is controlled, or the residence or convenience of the parties and witnesses, or the difficulty the court would encounter in attempting to interpret and enforce a foreign contract, or the interference with the other business of the court. But that is a matter resting in its discretion."

And after a review of the authorities he concludes (Tr. p. 565):

> "It is to me unthinkable that residents and citizens of Germany may import bodily into this court numerous actions against a non-resident defendant, on contracts made and payable in Germany, and insist as a matter of right that, because it has obtained jurisdiction of the defendant by service of its statutory agent the taxpayers, citizens and residents of the district having business in the court should stand aside and wait the conclusion of the case, where, as here, the courts of Germany and of the home state of the defendant are open and functioning."

Slater v. Mexican National Ry. Co., 194 U. S. 120, 48 L. Ed. 900, was an action at law brought in the Federal Court in Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico, to recover damages for the death of an employee of defendant, also a citizen of Texas, killed in Mexico in the course of his employment. Mexican law provided a remedy for death thus sustained. The court pointed out that the cause of action arose in Mexico, that the nature and extent of the recovery must be determined by the law of that country, that many difficulties would present themselves in an effort to determine the meaning of Mexican law and to apply it in a Federal Court; that the remedies were not such as were ordinarily within the competency of a Federal Court to administer. The action was ordered

dismissed. The court among other things said (pp. 126, 129):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations follows the person, and may be enforced wherever the person may be found. *Stout v. Wood,* 1 Blackf. 71; *Dennick v. Railroad Co.,* 103 U. S. 11, 18; 26 L. Ed. 439, 442.) But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith v. Condry,* 1 How. 28; 11 L. Ed. 305, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. * * *
>
> "The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case."

Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 409, 73 L. Ed. 762, 766, was an action brought in Mis-

sissippi by a Louisiana corporation against a Danish corporation having its principal American office in New York, and qualified for the transaction of business in Mississippi, upon a policy of insurance issued in South America where the loss occurred. The case was removed to the Federal Courts of Mississippi. It was contended that under the statutes of Mississippi the plaintiff had an absolute right to bring its action there. Among other things the court said in ordering a dismissal (P. 766):

> "The importation of such controversies would not serve any interest of Mississippi, * * * and, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them the power, to take cases arising out of transactions so foreign to its interests."

In *In re Belgenland,* 114 U. S. 355, 29 L. Ed. 152, the Supreme Court distinctly recognized the power of a trial court to decline jurisdiction over a controversy between non-residents of the forum and not arising therein. It was there said (p. 163):

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of

ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not."

Charter Shipping Co. v. Bowering, Jones & Tidy, 281 U. S. 515, 74 L. Ed. 1008, was a suit brought in New York arising out of a voyage of a ship from the Atlantic coast of the United States to London. The parties were English corporations doing business in this country. The District Judge in the exercise of his discretion dismissed the suit and remitted the parties to French courts. The Circuit Court of Appeals reversed the dismissal. The Supreme Court in turn reversed the Circuit Court of Appeals and reinstated the judgment of the District Court, holding that his discretion should not be reviewed unless abuse was shown. The Supreme Court pointed out that the case apparently involved the application of English law and that the American witnesses were not shown to be in or near the Southern District of New York, where the suit was brought and, in part, said (P. 577) :

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed, unless abused. The Belgenland, 114 U. S. 355, 368, 29 L. Ed. 152, 157, 5 Sup. Ct. Rep, 860; The Maggie

Hammond, 9 Wall. 435, 457, 19 L. Ed. 772, 780. * * *

"Both the parties being British subjects, and the present litigation as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum'. See The Maggie Hammond, supra (9 Wall. 457, 19 L. Ed. 780). * * *

"While some witnesses as to seaworthiness were 'American repair men', it does not appear that any were in or near the Southern District of New York.

"It was for the District Judge to consider the facts appearing and the inferences that he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

In *Missouri Pacific v. Clarendon Co.,* 257 U. S. 533, 66 L. Ed. 354, a suit by a railroad company of Missouri against a New York corporation on the breach of an Arkansas contract was refused admittance into the Louisiana courts. The late Chief Justice of the United States said (P. 535):

"Still less is it incumbent upon a state in furnishing such process to make the jurisdiction

over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the state. Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the state upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the state. * * *

In *Cuba R. Co. v. Crosby,* 222 U. S. 473; 56 L. Ed. 294, Mr. Justice Holmes comments on the enforcement of foreign causes of action as follows (P. 479):

"We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold. * * *

"There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the

> place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. The Maggie Hammond, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

The Supreme Court has declared unconstitutional state statutes permitting suits by non-residents in a jurisjiction in which no element of the cause of action has its situs, although the railroad company defendant is suable there. In *Davis v. Farmers Co.,* 262 U. S. 312, 67 L. Ed. 996, it was said (P. 315):

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of em-

> ployees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18-A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama v. Vicksburg Ry. Co. v. Journey,* 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

Goldman v. Furness & Co. (D. C. N. Y. 1900), 101 Fed. 467, was a suit on a contract made in Canada between a German and an English corporation doing business in Canada and New York. First, the German brought the suit in the Federal Court in New York and upon motion of the defendant, the court remitted the parties to Canada by dismissing the action. The German thereupon assigned the cause of action to a resident of New York, who immediately brought the present suit in the Federal Court in New York. Upon motion to dismiss, the Court (Brown, J.) again considered the point and in dismissing the second suit, said (P. 467):

> "Upon a former libel filed February 15, 1900, by Sally Wertheim, as libelant, against the present defendant, upon a special appearance of the defendant and affiravits showing that both parties were non-residents; that the contract was in fact made between the agents of the parties in person in Montreal; that no part of the contract

was to be executed within the United States; that it had been partly performed; that it was governed by the law of Canada, and that nearly, if not quite all, of the witnesses were there, and that the convenience of the parties would be greatly subserved by the trial of the cause in Canada, rather than within this jurisdiction, it was held that the Court should not exercise its discretionary power to enforce a trial of the cause here, but should remit the parties to the more appropriate forum of Canada. * * *

"It is impossible to suppose that the assignment alleged is anything else than a colorable assignment, made for no other purpose than to present an American citizen as libelant, and thereby remove one of the grounds upon which the former libel was dismissed. Aside from this circumstance, all the substantial reasons for prosecuting the suit in Canada rather than in this jurisdiction, remain as before; and if the court was not required to take jurisdiction of the former libel, and if Canada was the proper forum for the trial of the cause, it would seem manifest that an assignment that can only be deemed colorable should make no difference. * * *

"Every circumstance opposes the trial of the cause within this jurisdiction and makes that of Canada more appropriate, except apparently the choice of the German company and its agent, the present libelant. This court is overburdened with causes which must be tried within this jurisdiction; and it ought not voluntarily to entertain jurisdiction of other causes which on all grounds are more appropriately triable elsewhere, to the

neglect and prejudice of its own proper and necessary business."

In *Atchison Ry. Co. v. Weeks,* 254 Fed. 513, the Circuit Court of Appeals for the Fifth Circuit discussing the public policy against subjecting a large, widespread institution to suits far away from the place where the causes arose, said (P. 518):

"When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including

Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states."

In the case of the 194 Shawls, (D. C. N. Y. 1848) F. C. 10521 (18 Fed. Case 703), Judge Betts anticipates the present rule on the subject in the following language (P. 705):

"I find no authority of weight which imposes on the courts of our country the necessity of determining controversies of foreigners resident abroad, either in common-law actions, transitory in their nature, or maritime proceedings when the remedy is in rem.

"If the doctrine were peremptory, imparting to suitors the right to such aid, and imposing on courts the obligation to afford it, actions for supplies and materials, on charter-parties and bills of lading, or by mechanics for labor, would be comprehended within the class, equally with suits for wages, on bottomry bonds or for salvage compensation. * * *

"Should it transpire, in the progress of the litigation, that the law of the domicile of the parties must be ascertained in order to adjudge rightly on their claims, or that witnesses must be examined there to fix the facts in the controversy, the court might be compelled to suspend its movement and wait until these cardinal particulars could be supplied from abroad. Every tribunal experiences the inconvenience and unsat-

> isfactoriness of so settling controversies between those even who can have no other means of redress, and will recognize the value of the principle which enables them, in regard to foreigners, to remit their controversies to their home tribunals, where the law is known, and the facts can be more surely determined.

In *Watts, et al. v. Unions, etc.,* 224 Fed. 188, 191, in declining to retain a suit brought by a British company upon a cause of action arising abroad, said (P. 191):

> "But when parties foreign to a state come before its courts, asking cognizance of obligations which arose and were to be performed outside that state, the exercise of its jurisdiction is not obligatory; it is discretionary with a view to the circumstances. *The Belgenland,* 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Benedict's Admiralty, Section 195.
>
> "If jurisdiction is exercised, it is exercised as an act of international comity; if refused, the refusal does not arise out of any incapacity to act. Comity, therefore, is not a rule of law, but a rule of practice, convenience and expediency."

State courts seldom, if ever, have construed statutes vesting and defining jurisdiction as abrogating the doctrine of "forum non conveniens" or as forbidding a court in the exercise of a discretion, said by some courts to be inherent, to decline to retain jurisdiction and remit the litigants to the forum of their domocile and the origin of the cause.

The following cases are illustrative:

In *Robinson v. Ocean Steam Navigation Co.,* 19 N. E. 625, 112 N. Y. 315, 323, 2 L. R. A. 636, the court had before it the question of the right of a non-resident to sue in the state in the exercise of one of the privileges granted to him by the Federal Constitution. It was held that the non-resident had no such right. Among other things, the court said (P. 323):

> "The discrimination between a resident and non-resident plaintiff is based upon reasons of public policy, that our courts should not be vexed with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice, and of convenience, is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose or the subject matter of the litigation is situated within this state."

In *Pietraroia v. N. Y. & H. R. R. Co.,* 116 N. Y. Supp. 249, 250; 133 App. Div. 829, the court had before it an Act of the New York Legislature passed in 1913 declaring that certain classes of actions might be brought in New York and that certain classes of suitors might bring actions in New York. The cause of action arose in New Jersey, where the decedent had resided and where all of the beneficiaries of her estate resided. The defendant was a New Jersey corporation authorized to transact business in New Work, where service might be made upon it and thus technically was within the

statute. The plaintiff, a resident of New York, had been appointed an administrator in New York, and was within one of the classes of suitors enumerated in the statute. On motion the court dismissed the action, among other things saying (P. 250):

> "No resident of this state had the slightest interest in the controversy and certainly there is objection to the courts of this state concerning themselves with controversies between non-residents. * * * If, technically speaking, the Supreme Court of this state had jurisdiction of the action, the plaintiff being a resident, the courts are not bound to exercise the jurisdiction when those solely benefited are non-residents and when no reason exists why the liability cannot be enforced in the state where the parties reside and where the cause arose."

On appeal to the Court of Appeals (197 N. Y. 434; 91 N. E. 120), the dismissal was affirmed. That court held that the statutes would not be construed as requiring the court to retain jurisdiction, or as interfering with the inherent power of the court, in the exercise of its discretion, to dismiss the case where it appeared that the real controversy was in fact between non-residents upon a cause of action arising outside of New York.

Waisikoski v. P. & R. Coal & Iron Co., 159 N. Y. Supp. 906, 178 App. Div. 578, was an action brought in New York on a cause of action arising in Pennsylvania by residents of the latter state against a Pennsylvania corporation doing business in New York. Service upon

the defendant in New York was authorized by the statute, and it was the contention of plaintiff that the New York courts were bound to try the case because plaintiff had made proper service upon the defendant in New York. The court suggested doubt as to the power of the Legislature to take away from the court the power in its discretion to decline jurisdiction where the cause of action arose in another jurisdiction where the courts were open and functoning, the applicable laws familiar to those courts and where the witnesses resided, and where it appeared for those and other reasons that it might be difficult for the court to do as full and accurate justice as might be obtained where the cause of action arose. It was held that the statute would not be given such construction. The action was dismissed and the dismissal affirmed by the Court of Appeals (228 N. Y. 589, 127 N. E. 923).

See also:

Collard v. Beach, 81 N. Y. Supp. 619, 81 App. Div. 582.

Bagdon v. P. & R. Coal & Iron Co., 165 N. Y. Supp. 910.

Smith v. Mutual Life Insurance Company, 96 Mass. 336 (14 Allen), was a suit brought in Massachusettts by one non-resident against another, both, however, citizens of the United States. The subject matter of the suit was within the general jurisdiction of the court and the defendant was properly served with process in Massa-

chusetts. The court, in the exercise of its discretion, declined to retain jurisdiction, saying (P. 343):

> "But aside from the question of power, depending on the right of jurisdiction, we regard it as within the province of the court, sitting as a court of equity, in its discretion, to decline to exercise jurisdiction in such case; referring parties to the tribunals of the state upon whose laws these relations and rights peculiarly depend, and where alone they can be effectually and properly administered."

National Telephone Mfg. Co. v. Dubois, 165 Mass. 117, 42 N. E. 510, 30 L. R. A. 628, was a suit by a resident of New Hampshire against a Pennsylvania corporation which had an office and place of business in Boston and where proper service of process upon it was made. The court pointed out that the cause of action arose in Pennsylvania; that the books, papers, records and witnesses of the defendant relating to the matter were in Pennsylvania; that the defendant would be subjected to great and unnecessary expense and inconvenience if the trial were had in Massachusetts; that the inquiry could be carried on with less expense and difficulty if suit was brought in Pennsylvania; and in the exercise of judicial discretion the court dismissed the suit and remitted the plaintiff to the courts of the state where the cause of action arose.

Mexican National R. R. Co. v. Jackson, 89 Texas, 107, 31 L. R. A. 276, was an action brought in the Texas courts on a cause of action in favor of a Texas citizen,

which, however, arose in the course of his employment in Mexico. The Mexican laws upon which the right of action was based were similar to those considered by the Supreme Court of the United States in the Slater case, supra. The court said that the law of Mexico must be applied in determining the rights of the parties, that the action was transitory and ordinarily might be maintained in any place where the defendant could be found, providing there was no reason why the court whose jurisdiction was invoked should not entertain the action, and remarked (P. 113):

> "The plaintiff, however, has no legal right to have his redress in our courts, nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law by which the right claimed must be determined is such that we can properly and intelligently administer it, with due regard to the rights of the parties. * * * The decisions of this court, well sustained by high authority, establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country under statutes materially different from the law of this state in relation to the same subject.
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> * * * * * *
>
> "Many difficulties would present themselves, in an attempt to determine the meaning of the Mexican law, and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by

pracedent, and we have no access to reports of the adjudicated cases of those courts, from which we could ascertain their interpretation of these laws. The language of some of the articles quoted is ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. There could be no reasonable certainty that the parties' rights would be adjusted here as they would be if the case were tried in the courts of that country, which is their right; for it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases."

The court then said that if they assumed jurisdiction of controversies of this chacacter —

"We will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and a trial by jury secured, to seek the courts of this state to enforce their claim. Thus we would add to the already over-burdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the state, under the laws of a different government, a charge upon our own people."

Western Union Tel. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708, was an action to recover damages for failure to deliver a telegram. No question of jurisdiction over the defendant was raised in the lower court and no motion was made to dismiss the case in the exercise of discretion upon the ground that the parties were non-residents, and the question was not raised in any way in the lower court. For this reason the Appellate Court declined to consider whether, in the exercise of discretion, the lower court should have dismissed the case. However, in discussing the case the court made these observations (P. 85):

> "There may be some question of the propriety of our courts allowing themselves to be made the dumping grounds for litigants of other states, where the parties and witnesses reside there, the cause of action arose there, the contract was to have been performed there, and the courts of that state are open to them; and in such cases there can be no reasonable ground for seeking this jurisdiction except in order to get the advantage of some more favorable ruling than the decisions of their own state afford them."

Great Western R. R. Co. v. Miller, 19 Mich. 305, was an action brought by a Canadian citizen against a Canadian corporation doing business in Michigan. The defendant made voluntary appearance and moved the court, in the exercise of its discretion, not to retain jurisdiction but to dismiss the case. The Trial Court directed the dismissal of the case. After pointing out

that the case was within the general jurisdiction of the court, so that it was not a question of the power to proceed but a question of whether or not it was just and experient to proceed, the Supreme Court said (P. 314):

> "But where parties are not residents of the United States and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, they are not compellable to proceed in such case. It is not to be denied that much hardship is likely to arise where a person is called upon to defend himself against a charge arising out of transactions at a distance and out of the jurisdiction. Witnesses cannot always be compelled or induced to be present at the trial. * * * Questions of foreign law may, as in this case, become important elements of decision. We think that when, by the pleadings or upon the trial, it appears that our tribunals are resorted to for the purpose of adjudicating personal torts committed abroad between persons who are residents where the tort was committed, the inconvenience and danger of injustice attending the investigation of such controversies, render it proper to decline proceeding further."

Disconto Gesellschaft v. Terlinden, et al., 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045 (affirmed by the U. S. Sup. Ct. 208 U. S. 570, 52 L. Ed. 625), was an action brought in the courts of Wisconsin by a banking corporation of Germany against Terlinden, a German subject, who had absconded from Germany and was served with process in Milwaukee. The plaintiff

after bringing the action attached certain funds in Milwaukee banks, there deposited by Terlinden.

The court pointed out that an action by a non-resident alien upon a cause of action arising in a foreign country is entertained or not in the courts of this country as the principles of comity may dictate; that jurisdiction may be assumed or declined at the discretion of the court; that the court should decline to take jurisdiction when public policy, convenience or the protection of the interests of the citizens of the state would seem to require that course; that it is not a question of the existence of the power to take jurisdiction, but a question of discretion in its exercise. The court referred to the volume of judicial business in the courts of Wisconsin, the crowded condition of the court docket, and then said:

> "The laws of the state are enacted primarily for the regulation, benefit and protection of persons, rights and property within its jurisdiction. To hold that two foreigners may import, bodily, a cause of action, and insist it is a matter of right, that taxpayers, citizens and residents shall await the lagging steps of justice in the ante room, while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable if not absurd."

In *Stewart v. Lichtenberg,* 148 La., 195, 86 So. 734, the court said (P. 200):

> "However, under the rule of comity, between the several states, the courts of the one may, in

> their discretion, entertain jurisdiction over controversies, where personal citation is had within their territorial limits, between the citizens of other states, when it is within their power to do full and complete justice between the parties. But this power arises from no duty or inherent right in the litigants, and solely under the rule of comity referred to. Hence, when it appears that they may not be capable of doing full and exact justice between the parties because of a want of knowledge of the laws of another state, or where the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and the investigation will be surrounded with great difficulties, which can be avoided by suing at the defendant's domicile, courts may, and generally do, decline jurisdiction. R. C. L. vol. 7, pp. 1035, 1036; notes to 70 L. R. A. 513. See also, note to *Logan v. Bank of Scotland,* 3 Ann. Cas. 1153."

The rule announced and so frequently applied by the American courts is in harmony with the uniform practice of the highest British courts.

In *Societe du Gaz v. Les Armateur Francais* (1926), Sess. Cas. (H. C.) 13, a French cargo owner, on behalf of English underwriters sued a French steamship owner for a lost cargo, under a charter party in the English language in a form approved by the English Chamber of Shipping. The suit was in Scotland and there came to the House of Lords the question whether the lower

court rightfully remitted the plaintiff to the French courts.

The facts and the reasons which actuated the highest British court in upholding the refusal to retain jurisdiction appear from the following quotations:

From the Lord Chancellor (Cave):

"Now what are the relevant facts in this case? The pursuers and defenders are French companies carrying on their business in France. Neither of them has any place of business in Scotland. the ship in question was a French vessel built in France, and carrying a cargo for delivery to the pursuers in France under a charter-party of which none of the obligations fell to be performed in Scotland. The surviving members of the crew, and the crew of another vessel which for a time sailed with the ship which was lost, are French. The instructions to the master, and the log books, are in the French language, and the plans of the vessel are on the metric system with French notes. The vessel was of a special type known in France as the 'Marie Louise' class, upon which, as it appears from the pleadings of both sides, a Commission of the French Senate has reported, and has made certain recommendations with a view to safety. Lastly, it is said that the law of France permits the defenders under certain circumstances to limit their liability by abandoning the ship and freight and that they would be deprived of the opportunity of claiming this right if the suit were tried in Scotland.

"Against this series of facts, pointing to a

French Court as the appropriate tribunal for the trial of the issues, there are two facts which are said to operate in the other direction. First, the charter-party is in the English language and in a form approved by the English Chamber of Shipping; and, secondly, some witnesses who saw the vessel loaded are resident in Northumberland. But the form of the charter-party appears to be in common use by foreign owners; and clause 30 of the charter-party, which provides for arbitration only as to disputes arising at a port in the United Kingdom, gives rise to the inference that the parties contemplated that other disputes should be determined in the French Court. As to the English witnesses, their evidence could no doubt be taken in France, and in any case the existence of English witnesses is not a strong argument in favour of a trial in Scotland. From the beginning to the end of the case there is not a breath of Scotish atmosphere.

"I will only refer to one other circumstance. It appears to be the case that the real pursuers, that is to say, the persons who are behind the pursuers upon the record, are a firm of underwriters carrying on their business in England; but it does not appear to me that this is a circumstance which ought to affect the decision. The underwriters can only stand in the shoes of those to whose rights they are subrogated, and whose name they use; and your Lordships would, I think, treat the nominal pursuers as the actual pursuers for the purposes of this application. Further, the underwriters carry on their business in England and not in Scotland.

"In view of these facts I find myself unable to differ from the decision of the Court of Sessions that the Sheriff Court in Dumbarton is not an appropriate Court for the hearing of this suit, and indeed I find it difficult to conceive of a stronger case for the application of the doctrine of forum non conveniens."

* * * * * *

Lord Shaw:

"If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or of the residence or domicile of parties, or of its being either the locus contractus, or the locus solutionis, then the doctrine of forum non conveniens is properly applied.

"In the present case the matter was brought to a point when I asked Mr. MacMillan: Was there one Scottish fact in the present case? and he answered that, except the bringing of this action, there was not one. Everything to be proved was outside of Scotland; parties were outside of Scotland; contract was outside of Scotland; the circumstances to be proved were, one set in France, and the other in England.

"In those circumstances it seems to me to be a violation of all propriety not to sustain the plea, as has been done."

Logan v. Bank of England, 1 K. B. 141 (1906), 3 Ann. Cas. 1148, is a decision by the English Court of Appeals affirming the dismissal of a case arising in

Scotland brought in London by a resident of Scotland against the defendant, a Scottish bonding corporation, with a branch in London. The opinion of the court contains so clear a statement of the doctrine for which we contend that we quote from it at length:

> "The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland; all the parties to the action reside in Scotland, with the exception of the defendant Scott, who appears to reside in London.
>
> "The plaintiff is a schoolmaster, who resides at Inverary, in Argyllshire, and is a domiciled Scotsman. The bank is a Scottish corporation incorporated under an Act of Parliament in Scotland in the year 1695, and they have their head office in Edinburgh and numerous branches at various places in Scotland. The only branch of the bank outside of Scotland is in London, and the writ of summons in this action was served on the bank there. But the London branch appears to have taken no part and was not concerned in any way of the matters in question in this action.
>
> "It is clear from the affidavits in this case that all the circumstances upon which the plaintiff relies in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto will have to be obtained from Scotland.
>
> "If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous

books, documents, and papers relating to the matters in question in Scotland, about the production of which there might be considerable difficulty having regard to what is stated in the affidavit of Sir George Anderson, and also probably a consideration of Scottish law as affecting the rights and liabilities of the respective parties, and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England will be so great as to put a great oppression upon them if they were obliged to produce and keep their witnesses and documents, etc., in London during the time such a trial as that which would take place would last. In fact, the inconvenience would be so great and the expenses so heavy as to be utterly out of proportion to the insignificant sum involved in this action.

"The defendants made this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant bank under cover of asking justice, and in the hope that the bank, rather than incur the trouble and expense of trying the action in England, may be induced to pay something in order to get rid of an unfounded claim.

"The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court.

"Now, it is true that the Courts of this country have not gone so far as to express themselves upon the question of convenience in terms similar to those used in the Scotch cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were

merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it. Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, which it could be, as it has been in the present case, because it has a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why any one abroad might not sue and

be allowed to proceed, against a bank which had a branch in this country, in respect of transactions all of which had taken place in some other country where the head office of the bank was — e. g., Australia or Brazil — and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice against the defendant. This matter is, in this respect, of general importance, because so many banks and other mercantile houses which are established in our Colonies have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence, would be intolerable. In the present case, apart from this question about Scott, it is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh, and when together with their officials they would have to bring up here, and keep away from their business, numerous other witnesses with a mass of books, papers, and documents, if they can get them at all, which there seemed to be some difficulty about without orders from the Court of Sessions as to some of them. All this to my mind is not measured by mere expense, and even on the question of expense it is to be pointed out that the cost of trying a case such as that indicated by the statement of claim, which refers to very complicated matters and attacks the character of

the bank and Sir George Anderson, is utterly out of proportion to the trumpery amount in dispute; and if the defendants win, one would gather that they would have little prospect of recovering their costs from the plaintiff.

"For these reasons, I think that this appeal should be allowed with costs here and below, the master's order restored subject to a slight correction, and the plaintiff left to pursue his remedies against the bank and Sir George Anderson on the other side of the Tweed amid his own countrymen. This involves no hardship upon the plaintiff, but is really to his advantage if his claim is persisted in and fought out; for he can make it at less expense and trouble to himself in Scotland than in England."

Cases Cited by Counsel for Appellant Discussed

On pages 13, 14 and 15 of Appellant's Brief a number of cases are cited to the proposition that, by removal to the Federal Court, appellee waived the objection that the suit was not brought in the district of its residence. No such question was raised by the motion, or in the lower court, and it is not raised here.

The cases which we will now briefly review are those cited by counsel for appellant in support of their contention that it was the imperative duty of the trial

court, without regard to the facts appearing in the record, to try the case and proceed to judgment.

It may be conceded that if a litigant, having a justiciable cause, resorts to the proper court, he is entitled to be heard. The cases cited in appellant's brief, read in the light of the facts in each case, go no farther.

In *Cohen v. Virginia,* 19 U. S. (6 Wheat.), 264, 403, the only question decided was that the Supreme Court had jurisdiction, under the Judicial Code of 1789, to review a judgment or decree of the highest court of a state in a case where the validity of a treaty or statute of the United States was drawn into question and the decision was against the validity thereof.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, was brought in the Federal Court of New York by a New York corporation against New York officials to enjoin enforcement of laws fixing gas rates alleged to be confiscatory and violative of the Federal Constitution. The trial court enjoined the enforcement. The Supreme Court reversed the decree and dismissed the suit.

Second Employers Liability Cases (Mondou v. N. Y. N. H. & H. Ry. Co.), 223 U. S. 158, 56 L. Ed. 327, was brought in the state court to recover under the Federal Employers' Liability Act. The state court sustained a demurrer to the complaint. Among the questions considered by the Supreme Court of the United States was whether rights arising under the Employers' Liability Act might be enforced by suit in the courts of

the states when their jurisdiction as fixed by local laws was adequate for the purpose, and answered this question in the affirmative.

However, in *Douglas v. New York, New Haven & Hartford R. R.,* 279 U. S. 377, 73 L. Ed. 747 (not cited in appellant's brief), an action brought in a New York court under the Federal Employers Liability Act for injuries sustained in Connecticut by a resident of that state against a corporation doing business in New York, the Supreme Court held that the New York court was within its rights in declining in the exercise of its discretion to retain jurisdiction, and that:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned."

Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, was an action brought by the Construction Company, a Missouri corporation, in the Federal Court of Arkansas against Kline and others, citizens of Arkansas, for breach of a contract to pave certain streets in a city in Arkansas. There existed the jurisdictional amount in controversy and diversity of citizenship.

Kline and his co-defendants then brought a suit in equity in one of the state courts of Arkansas, against the Construction Company, joining as defendants the sureties upon the performance bond, who were citizens

of Arkansas. The Supreme Court held, inasmuch as each case was a proceeding in personam it was not proper for the Federal Court to enjoin the case in the state court, and that each court might proceed in the exercise of its ordinary powers.

Raich v. Truax, 219 Fed. 273, affirmed 239 U. S. 33, was a suit brought by a subject of Austria residing and employed in Arizona, to restrain the Attorney-General and other officers of Arizona from enforcing a law of that state alleged to be violative of certain rights of the plaintiff guaranteed by the Federal Constitution. Obviously the plaintiff had a right to resort to the Federal Court to have his alleged constitutional rights determined, and inasmuch as the case was essentially local in character, the only Federal Court in which he could bring his suit was the Federal Court sitting in Arizona.

Southern California Tel. Co. v. Hopkins, 13 Fed. (2d), 814, 820, was a suit brought by a California corporation against certain public officials of Los Angeles County to enjoin seizure and sale of a large number of telephone talking sets in satisfaction of a local tax alleged to be violative of both the state and Federal Constitutions. The District Judge held that it could not be maintained until after the telephone company had exhausted its supposed remedies under the state laws. This court held that it could.

Norris v. Illinois Central, 18 Fed. (2d), 584, was brought in the Federal District Court of Minnesota under

the Federal Employers' Liability Act. This act provides that the plaintiff may bring an action in any district where the carrier does business. The railroad company operated a railroad line through Minnesota. A motion was made to set aside the service of process upon the ground that the action was not brought in the proper district. The Court overruled the motion, holding that where an action was brought under the Employers' Liability Act in a district in which the carrier was transacting business, service of process might be properly made there.

Re Thirty-fourth Street Railroad Co., 102 N. Y. 343, 353, 7 N. E. 172, 177, was a proceeding under the New York Act of May 6, 1884, to determine whether a proposed street railroad should be constructed. The act among other things provided that on application the court should appoint commissioners to determine whether or not the proposed railroad should be constructed. It was held, construing the language of the Constitution and of the legislative act, that it was the duty of the court, when proper application was made, to appoint commissioners.

Crane, etc., v. R. R. Co., 225 N. Y. Supp. 775, 131 Misc. 71, is a decision by one of the judges of the New York City Court. The plaintiff was a Massachusetts corporation, the defendant a Connecticut corporation, with an office in New York. Where the cause of action arose does not appear. There was no suggestion by motion or otherwise before trial that the court did not have

or should not take jurisdiction. Apparently some question was raised on the trial as to the jurisdiction of the court and the court held that it might proceed to judgment.

State v. Grimm, 239 Mo. 135, 143 S. W. 483, was an action upon an insurance policy issued to a citizen of Illinois by an insurance company organized in California and transacting business in Missouri. A motion was made to quash the service of summons upon the ground that the statutes of Missouri, properly construed, did not authorize service to be made upon a non-resident insurance company in an action upon a policy issued outside of Missouri. The motion was denied. That was the only question before the court.

Kimball v. Neal, 44 Vt. 567, involved the question whether action for possession of land should be brought in a law court or in equity.

In *Hagerstown B. Co. v. Gates,* 117 Md. 348, 83 Atl. 570, it was contended that the laws of Maryland, properly construed, did not authorize process to be served in an action by a non-resident on a contract made in another state. The court held that process might be served and jurisdiction of the person of defendant obtained.

In *Langnes v. Green,* 75 L. Ed. 379, No. 9 Adv. Sh. Oct. 1930, Term, the question was whether a ship owner against whom an action was brought in the state court to recover damages for injury sustained by a sailor had the

right to petition for limitation of liability in the Federal Court and enjoin the action in the state court, it appearing that there was but one claimant. The Supreme Court held that under the circumstances disclosed by the record it was improper to enjoin the prosecution of the action in the state court.

On page 16 of appellant's brief mention is made of the case of *State, ex rel Kahn, v. Tazwell,* 125 Ore. 528. That was the first of the German insurance cases brought in Oregon. The defendant moved to quash the service upon the ground that the statutes of Oregon properly construed did not authorize service to be made on a foreign insurance company transacting business in Oregon, based on a policy not issued in Oregon. The court overruled this contention. That was the only question properly before the court.

People, ex rel Beha, Supt. of Insurance of N. Y. v. Russian Re-Insurance, et al., 175 N. E. 115, No. 2 Adv. Sheets April 8, 1931, referred to on page 21 of appellant's brief as the Dougherty case, arose in connection with proceedings by the Superintendent of Insurance of New York to liquidate the assets in this country of two Russian insurance companies which for many years before the World War had operated branches in the State of New York and elsewhere in this country. In August, 1925, the Superintendent took possession of the assets of the New York branches in accordance with the New York insurance law, for the purpose of conserving them for the benefit of those entitled thereto, in view of the

hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic, and not because the insolvency of either of the companies was present or imminent. By various decrees of the New York courts the liquidator was protected in the possession and liquidation of the assets and the creditors restrained from pursuing any legal remedies until the domestic creditors and policyholders had been paid in full, as well as all foreign creditors who had acquired liens by attachment before liquidation was begun. After these claims had been paid the Superintendent held a surplus of about one million dollars for one company, and upwards of a million for the other, and the question was what disposition he should make of these funds. If there is anything in this pertinent to the case at bar it is certainly contrary to the contentions of appellant here. Creditors and policyholders with claims arising out of foreign business insisted that their claims should be paid by the liquidator, and if not, that they should be permitted to prosecute their claims in the courts by ordinary legal proceedings. The insurance companies insisted that they were entitled to the surplus funds and to deal with the claims arising out of foreign business. The Superintendent of Insurance took the position that he should be permitted to hold the surplus intact until some government recognized by this country should function in Russia. The court held that the authorities in New York had performed their full duty when they had paid the domestic creditors and others acquiring liens by attachments before the liquidator took

charge, that it was no part of their duty to hold the surplus or deal with the claims arising out of foreign business, that the Russian companies were competent custodians of the surplus funds, and the liquidator was directed to turn them over to these companies.

Finally, *Denver E. T. Co. v. Roller,* 100 Fed. 738, a decision by this court, is said by counsel for appellant to be in point. Mrs. Roller was injured in Colorado while a passenger on the train of plaintiff in error. The latter was a Colorado corporation. It had no railroad line in California, but had offices and agents there. It does not appear where the defendants in error resided, but it may be fairly assumed that they were residents of California. The action was brought in the state court and removed to the Federal Court, where a motion was made to quash the summons. The only question involved upon the motion was whether service was authorized by the laws of the State of California, and it was held that it was.

EACH POLICY, AS REQUIRED BY GERMAN LAW, SPECIFIED CERTAIN GERMAN COURTS AS HAVING EXCLUSIVE JURISDICTION OVER DISPUTES ARISING THEREON. THESE VENUE STIPULATIONS WERE VALID WHERE MADE, ARE FAIR AND REASONABLE, AND SHOULD BE UPHELD.

It is a familiar rule that the validity of a contract is to be determined by the law of the state or country in which it is made and to be performed, and that a contract valid where made is ordinarily valid and given effect everywhere. *(Jamieson v. Potts,* 55 Ore. 292, 300; *Shaw v. Postal Tel. Cable Co.,* 79 Miss. 670, 31 So. 222, 56 L. R. A. 486; 5 R. C. L., 931, 934; 13 C. J. 253.)

There may be some exceptions to this rule, but none within which falls the venue stipulation in the policies. It is not immoral, and is not, in the language of the Supreme Court of Massachusetts in *Mittenthal v. Mascagni,* infra:

> "So improvident and unreasonable — such an abnegation of legal rights — that the government, for the protection of mankind, will refuse to recognize it," etc.

The German insurance law of May 12, 1901, Article 9, required that certain conditions should be contained in every life insurance policy issued in Germany and among these were (Trans. Rec. 75, 77):

> "The manner, the extent and maturity of the obligation on the part of the assurer.

> " * * * The proceedings in cases of dispute arising from the assurance contract, the competent court, and the appointment of a court of arbitration."

When defendant was admitted to transact business in Germany, it at once, as to the business transacted there, became subject to German law. The type of policy issued and the terms thereof were such as were prescribed by those laws.

The venue provisions in the three policies are identical. A copy of one policy is attached to the amended complaint (Trans. Rec. 54). It is alleged in the amended complaint that the other two policies are identical except as to numbers (Trans. Rec. pp. 2-b, 2-e, 2-i). These venue provisions (Trans. Rec. 104) specified the German court of the residence of the chief attorney in fact for Germany or the German court within whose jurisdiction was located the German agency through which the insurance policy was issued, if appointed according to Paragraph 115 of the German insurance laws. Each policy was negotiated and issued at Berlin, where the chief attorney in fact and the secretary for Germany resided and they were appointed pursuant to said Section 115 (Trans. Rec. 446-7-8-9).

Mr. Buckner says (Aff. Trans. Rec. 448):

> "The policy contains a clause headed 'Jurisdiction and Domicile within the Country', and this vests in certain specified courts of Germany

exclusive jurisdiction of all actions growing out of or based on the policy."

The affidavit then sets out the venue provisions, and continues (P. 449):

> "At the time said policy (referring to one of the Heine policies) was applied for and issued the insured was engaged in business in and was a resident of Berlin, Germany, where the chief or principal office of the defendant in Germany was located, and where its chief representative for Germany resided, and to the courts of which he was subject, and ever since then the insured has continued to reside in said Berlin," etc.
>
> * * * * * *
>
> "At all times since 1904 the defendant has maintained * * * in Germany a general representative and attorney-in-fact appointed pursuant to the aforesaid §115 of said laws of Germany Relating to Private Insurance Enterprises, and upon whom process issued out of any of the courts of Germany and directed to defendants might be served. * * * In no action commenced in Germany upon a mark policy issued in Germany has defendant sought to evade the jurisdiction of the German courts or to invalidate service made in Germany upon defendant's said representative in Germany."

Dr. Arthur Burchard discusses these venue stipulations, their validity and effect under German law, and cites and attaches to his affidavit several German decisions holding that no court other than the one specified may take jurisdiction (Trans. Rec. 206 et seq.; *Dessau v.*

N. Y. Life, Trans. Rec. 405 et seq.; *Rinck v. N. Y. Life,* Tran. Rec. 414 et seq.)

The American courts generally have refused to enforce contract stipulations which prevent citizens from applying to the courts of their own states. Venue stipulations entered into by a non-resident alien, vesting jurisdiction in the courts of his own country, are an entirely different matter. Typical reasoning for the rule of invalidity is found in the case of *Myers v. Jenkins,* 63 Ohio St. 101, 57 N. E. 1089, where it was said:

> "The whole state has an interest in all its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract, in advance, deprive himself of the right to appeal to them."

In *Gregonius v. Philadelphia Co.,* 235 N. Y. 152, 139 N. E. 223, it was said:

> "The courts of this state are primarily for the residents of this state. There must be some forcible, controlling reasoning entering into the very nature and essence of the action which would close their doors to its own citizens."

Contemporaneously with the development of the doctrine of invalidity of contractual stipulations depriving a person of the right to resort to the courts of the state of which he was an inhabitant, the courts, both

here and in England, were upholding provisions locating the venue of foreign actions in the courts of the residence of the alien plaintiff.

In *Geiner v. Meyer,* (1796) 2 H. Bl. 603, the Lord Chief Justice said:

> "Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the King's Courts, yet when the parties are foreigners, bind themselves, in their own country, not to sue in any other, * * * I think we ought to look into the contract * * * that we may not do anything here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws or at least as there is no evidence to show it is not good, we must presume it to be so. Then the first thing that stares us in the face is an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in Holland, the contract is to perform the whole voyage ending in Holland and to seek their remedy in their own courts of justice."

In *Thompson v. The Catherine,* (1795) 1 Pet Adm. 104, Fed. Cas. 13949, the court said:

> "On several occasions, I have seen it part of the contract, that the mariners should not sue in any other than their own courts — and I consider such a contract lawful. It would be against law and void, as it were, that the mariner should not sue in any case; or that he should not sue in the proper court or courts of his country."

In the case at bar the contracts do not prevent the plaintiff from resorting to the courts of his own country. The right to do so is stipulated in the contract. The courts have frequently seen cogent reasons in favor of such a stipulation. Lord Ellenborough, in *Johnson v. Machielsen,* (1811) 3 Camp. 44, in upholding such a stipulation, said:

> "There may be great reasons for protecting the captain (defendant) from suits in foreign countries. It is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court."

In The Cap Blanco, 29 T. L. R. 557 (1913), the High Court of Admiralty had before it the claim of the Anglo South American Bank against a German vessel. The action was to recover damages for breach of a contract to deliver certain cases of German coin at Montevideo or Buenos Aires, and was instituted at Southampton by arrest of the vessel. The contract, or bill of lading, provided that any disputes concerning the interpretation thereof should be decided in Hamburg according to German law. The Court said:

> "There remains to be considered Clause (14) of the bill of lading which provides that any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law. It appears from the affidavit of Mr. Stokes that the defendants contend that they are protected from liability for the claim in

this action by the exceptions contained in the bill of lading, and this action involves, in my opinion, a dispute concerning the interpretation of the bill of lading within the meaning of Clause 14. * * * The tribunal at Hamburg is not specified, but a fair business-like reading of the contract means that such disputes are to be tried by the competent Court in Hamburg and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this Court. In dealing with commercial documents of this kind effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court. Although, therefore, this Court is invested with jurisdiction, I order that the parties may litigate in Germany as they have agreed to do."

Austrian Lloyds S. S. Co. v. Gresham Life Assurance Society (1903), 1 K. B. 249, was an action upon a life insurance policy issued by an English company having a branch office at Budapest, upon the life of one Rabl, a native of Trieste. It was assigned to the plaintiff in the

action. The policy was written in the French language. It was made subject to certain general conditions annexed thereto, and among others:

> "For all disputes which may arise out of the contract of insurance, all parties interested expressly agree to submit to the jurisdiction of the courts of Budapest having jurisdiction in such matters."

The trial court declined to give effect to this stipulation and the case was brought to the Court of Appeals. That court held that the stipulation was fair and reasonable and upheld it, Lord Justice Mathews among other things saying:

> "It might be of great importance to the insurance company, in case of a dispute arising under a policy of insurance effected at Budapest, that they should not have to bring witnesses from thence to distant places."

See also:

> *In re Belgenland,* 114 U. S. 355, 29 L. Ed. 152; *Olzen v. Schierenberg,* 3 Daly 100.

Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, is a leading case upholding the venue stipulation in a contract entered into in a foreign country.

Mittenthal was a citizen of the United States and a resident of New York, just as appellee is a citizen of New York. Mascagni was a subject of Italy, residing in Florence, in that country. The contract was entered into in Florence, the home of the defendant. By the

terms of the contract defendant, a famous Italian composer, undertook to direct certain concerts and present certain operas composed by him, in such parts of the United States and Canada as plaintiff should designate. The services of the defendant were not to be performed in Italy. The contract was in the Italian language and contained this provisions, among others:

> "Whatever difference or question there might arise between parties, including the agent, will be acted upon by the civil authorities of Florence, Italy."

Another provision reserved to Mascagni the right to bring an action in the courts of New York for payment of the compensation agreed upon.

Although he was a citizen of the United States and a resident of New York, plaintiff elected an Italian domicile for the purposes of the contract and the vesting of Italian courts with jurisdiction of controversies arising thereon, just as in the case at bar The New York Life Insurance Company, as required by the laws of Germany, elected a German domicile for all purposes connected with its German insurance business. The Court first considered the interpretation to be given to the quoted provision of the contract, and said:

> "The first and principal question is, What is the effect of the stipulation in regard to the adjustment of difference or questions between the parties? We have little doubt that it was meant to give exclusive jurisdiction of all such matters

to the Italian court; saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the courts of New York."

The court assumed that the provision was legal and binding in Italy under the laws of that country, reviewed some of the cases which had adopted the so-called invalidity rule, such as an agreement by a citizen that he would not resort to the courts of his own state, or an agreement ~~of the parties not to resort to any court, and then said:~~ by one or both of the parties not to resort to any court, and then said:

"Perhaps the tendency in modern times is to permit greater freedom in contracting matters of this kind than formerly. *Miles v. Schmidt*, 168 Mass. 338, 47 N. E. 115; *Daley v. People's Building & Loan Association,* 178 Mass. 13, 59 N. E. 452. In most cases — certainly in a case like the present — there is no occasion for the protection of the dignity or convenience of the courts. The contract was between citizens of foreign states, who, so far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of disputes.

"The determining question seems to be whether such a contract as this is was so improvident and unreasonable — such an abnegation of legal rights — that the government, for the protection of mankind, will not recognize it, even when made in a foreign country by citizens or subjects of that country."

The court then pointed out that defendant would be in many jurisdictions during the term of the contract, and as he might be sued anywhere and put to great trouble and expense, it seemed reasonable for both parties to provide that any controversy that might arise should be settled by a court designated in the contract, and, concludes the court, in sustaining the venue stipulation and dismissing the case:

> "If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compos mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?"

The same court in *Nashua Co. v. Hamermill Co.,* 223 Mass. 8, 111 N. E. 678, reaffirmed the foregoing decision and expressly declared that the two rules are not inconsistent. In that case, the plaintiff was a citizen of the forum and a stipulation forbidding action in his own court was held invalid.

THE APPELLEE, AND ALL ITS ASSETS LOCATED IN GERMANY, ARE UNDER THE CONTROL AND SUPERVISION OF THE GERMAN GOVERNMENT; THE RIGHTS AND REMEDIES WHICH APPELLEE IS REQUIRED TO GIVE, AND TO WHICH APPELLANT AND ALL OTHER HOLDERS OF GERMAN INSURANCE POLICIES ISSUED BY IT ARE ENTITLED, UNDER THE GERMAN CURRENCY AND VALORIZATION LAWS AND DECREES, ARE SPECIAL AND ADMINISTRATIVE IN CHARACTER AND ARE NOT SUCH AS THE AMERICAN COURTS ARE COMPETENT TO ADMINISTER.

Preliminary to a discussion of the laws of Germany, we will briefly state, and cite authorities to sustain, certain propositions as a premise to the discussion.

(a) The construction of a contract and the extent of the liability under it are determined by the law of the place where it became effective and is to be perpormed (*Jamieson v. Potts,* 55 Ore. 292, 300, 12 C. J. 448, 5 R. C. L. 931; *Shaw v. Postal Tel. & Cable Co.,* 79 Miss. 670, 31 So. 222, 56 L. R. A. 486).

(b) This rule is uniformly applied to contracts of insurance, whether entered into by mutual companies or non-mutual companies (*Northwestern Life Ins. Co. v. McCue,* 223 U. S. 234; *Mutual Life Ins. Co. of N. Y. v. Cohen,* 179 U. S. 181, 179 U. S. 262; *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551; *Daggs v. Oriental Ins.*

Co., 156 Mo. 383, 35 L. R. A. 227, 172 U. S. 557; 32 C. J. 976).

(c) And where a cause of action arises in a foreign country the courts here will only grant such relief as the suitor could have secured had the action been brought in the courts of the country where the cause of action arose (*Slater v. Mexican Nat'l Ry. Co.,* 194 U. S. 120, 126; *Sokolof v. National City Bank,* 139 Misc. Rep, 66, 22 N. Y. Supp. 102 (aff. 250 N. Y. 69); *Zimmerman v. Sutherland,* 274 U. S. 253; *4 Sedgwick on Damages* (9th Ed.), 2758).

(d) The German courts have uniformly held that the insurance policies issued in Germany to German nationals by appellee and other insurance companies are German contracts and that their construction, the extent of the liability thereunder and in what manner it may be enforced or discharged, are determinable exclusively by German law. This is of first importance inasmuch as appellee has a legal domicile in Germany, has large assets there, has complied with all of the requirements of the German government with regard to providing a valorization fund out of which all policy liabilities as determined by German law are to be paid, and the German government, assuming exclusive jurisdiction to deal with the rights of its own resident nationals, is administering the fund for that purpose.

We now cite some of the many cases decided by the

German courts and the German Insurance Board which have so held:

Ferensdorff, nee Herz v. Swiss Life Insurance Annuity Institute, a mutual life insurance company of Switzerland, decided by the Supreme Court of Germany — the highest court — December 18, 1929 (Burchard Aff. Trans. Rec. 181, Ex. "N", Trans. Rec. 291, 293).

Messerschmitt v. N. Y. Life Ins. Co., decided by the Berlin Court of Appeals (next to the highest court in Germany), March 12, 1930 (Burchard Aff. Trans. Rec. 186, Ex. "O", Trans. Rec. 298, 305).

Hardt v. N. Y. Life Ins. Co., decided by the Berlin Court of Appeals March 12, 1930 (Burchard Aff. Trans. Rec. 186, Ex. "P", Trans. Rec. 309, 318).

Marx v. N. Y. Life Ins. Co., decided January 27, 1930, by the Hessian Landgericht (District Court), (Buchard Aff. Trans. Rec. 188, Ex. "Q", Trans. Rec. 324, 330).

Protective Ass'n of Holders of Foreign Insurance Policies v. Swiss Life Insurance Annuity Institute, decided by the Munich Court of Appeals April 15, 1929 (Burchard Aff. Trans. Rec. 188, Ex. "R", Trans. Rec. 338, 346).

The above mentioned decision of the Munich Court of Appeals was affirmed by the Supreme Court of Ger-

many on February 21, 1930 (Burchard Aff. Trans. Rec. 188, Ex. "S", Trans. Rec. 354, 356).

Daunert v. Guardian Life Ins. Co., a decision by the Berlin Court of Appeals (Burchard Aff. Trans. Rec. 192, Ex. "T", Trans. Rec. 363, 364).

Decision of the German Insurance Board October 25, 1928, in the matter of New York Life Insurance Company (Burchard Aff. Trans. Rec. 178, Ex. "K", Trans. Rec. 258, 268).

Decision of the Appellate Division, February 13, 1929, affirming the above mentioned decision of the German Insurance Board (Burchard Aff. Trans. Rec. 178, Ex. "L", Trans. Rec. 272, 280).

(e) The American courts will not inquire into the validity, wisdom or justice of the laws or acts of the German government or its agencies. The jurisdiction of a nation over persons and things within its own territory is exclusive. It might seem that this proposition is too elementary to require mention or citation of authority, but the contrary has heretofore been vigorously asserted by counsel for appellant, and may be again asserted in this court, based upon some view or theory that the German currency and valorization laws and decrees of 1924 and 1925 changed the contractual relations of the parties and would therefore be held invalid by the American courts (33 C. J. 397; 15 R. C. L. 130; *Herman v. Phalen,* 55 U. S. 79; *Gebhard v. Canada So. Ry Co.,* 109 U. S. 257; *League v. De Young,*

52 U. S. (11 How.) 185; *Underhill v. Hernandez,* 65 Fed. 577, 38 L. R. A. 405, 168 U. S. 250; *Hewitt v. Speyer,* 250 Fed. 367; *Shaw v. Postal Tel. Cable Co.,* supra).

German currency legislation and the status of the German mark and mark contracts prior to the monetary laws of August 30, 1924.

Shortly after Germany assumed the status of an empire, following the Franco-Prussian war, it established a unified currency on a gold basis, that is, while its circulating medium was mostly paper, it was redeemable in gold. The unit of value was the mark. All the German insurance policies issued by appellee were expressed to be payable in Mark D. Rwg., which is an abbreviation for Marks Deutsches Reichswehrung, and means marks in the currency of the German Reich.

Prior to 1904 the appellee had obtained concessions from various German states to transact an insurance business. In 1904 it obtained a concession from the German Reich permitting it to transact business throughout Germany.

It was required by this concession and the German laws to keep, and it did keep in Germany and under the control of the German government, the full legal re-

serve for all policies issued in Germany, which means that it was required to keep sufficient funds and investments in Germany to meet at any time all obligations on the policies issued in Germany. The German law further required that all these reserves be kept invested in certain specified German mark securities, and in obedience to these requirements all of its reserves were invested under the control of the German Insurance Board in German Imperial, state and municipal bonds, and in loans to policyholders, and all of these ivestments or loans were payable in Marks D. Rwg.

Not only was appellee required to keep all of the premiums collected on German policies invested in Germany, but in addition it was required to deposit with the German insurance authorities, as a condition to the granting of the concession to transact business, two million marks, and during the war, to meet the unexpected mortality losses, made a further deposit out of non-German assets of 11,607,000 marks (Buckner Aff. Trans. Rec. 452, et seq.).

The affidavit of Mr. Peter A. Schwabe, filed by appellant in this case, brought into the record some circulars issued at Berlin by the chief representative of appellee for Germany during the war. One of these circulars (Trans. Rec. 458) states:

> "These headquarters will — no matter how the relations with the United States may develop — continue to carry on its German business as heretofore. It arrives at all decisions about

> German insurance contracts independently and disposes over entirely adequate money resources to meet all obligations to German insured. * * * It is especially pointed out that for all German insurance contracts here in Germany a full premium reserve, that is the current value of each policy is safely deposited. All liquid securities in the premium reserve which according to the quotations of the exchange of January 5, 1917, had a current value of 78,090,815 marks, are so deposited that they cannot be disposed of without the consent of the Imperial Supervising Office for Private Insurance."

Another of these circulars attached to the affidavit of Mr. Schwabe states (Trans. Rec. 549, 551):

> "The resources of the German branch are entirely sufficient to respond to all claims on German insurance contracts. Since the outbreak of the war we have acquired roundly 15,000,000 marks of German war loans for our deposits in Germany."

The mark currency in which the policies were made payable and in which all of the investments and loans of appellee in Germany were also made payable, continued to be the circulating medium and legal tender of that country until the passage of the Monetary Act of August 30, 1924, which, as will be hereafter more fully pointed out, created an entirely new currency called the Reichsmark, and provided that the old mark should be converted into the Reichsmark on the basis of one million millions of the former for one of the latter, and that con-

tracts payable in the old mark might be paid and discharged by payment in Reichsmarks at that ratio.

At the outbreak of the World War Germany suspended specie payment, or redemption, which was never thereafter resumed so far as the old currency was concerned. Similar measures were taken by all of the belligerent countries in Europe and by some of the neutral countries elsewhere. A few years after the war England successfully restored the pound sterling to its pre-war exchange value. France found it necessary to stabilize the old currency at approximately one-fifth of its pre-war value. So with Italy and Belgium. All contracts made before the war or during the war, payable in these currencies, may be paid in the depreciated currency by paying the number of units called for in the contracts.

The currencies of these countries did not suffer the great depreciation suffered in some other countries, as, for instance, Germany, Russia, Austria and Bulgaria. These countries did not undertake to retain the old currency or restore it to a pre-war exchange basis, but because of the tremendous quantity of currency issued and the depreciation which carried its value down to the vanishing point, new currencies and new units of legal tender were provided (Buchard Aff. Trans. Rec. 150 to 162).

Up to a short time before the end of the war the depreciation of the German mark was slight. Follow-

ing the war, due to a number of causes, the exchange value of the mark steadily decreased. The war had wasted much of the man power and of the accumulated wealth of Germany. Its industries were disorganized. The iron mines of Alsace and Lorraine and the gold mines of the Saar Basin and Silesia were taken away. Its colonies were divided among some of the allied powers. A part of Schleswig-Holstein was returned to Denmark, some German territory was given to Belgium, German Poland was incorporated into the new Poland, large forces of allied troops continued to occupy the Rhineland provinces, and the heavy burden of enormous reparations, yet undetermined in amount, further impaired the credit of the nation. The transition from a monarchy to a republic had been attended with some serious internal disturbances, and up to 1923 or 1924 the new government was not very secure. As the mark depreciated more were issued, which in turn caused further depreciation. By the fall of 1923 the quantity of marks which had been issued and were in circulation, if redeemed or retired at their nominal pre-war value, would equal, according to a distinguished German economist, many times the total wealth of the world.

During this time, and up to the enactment of the Monetary legislation hereinafter referred to, on August 30, 1924, no legal change had been effected in the mark as the unit of Germany. All debts payable in marks continued to be payable in marks, however depreciated.

In November, 1923, so great had become the depreciation of the mark, that one million millions thereof had the purchasing power of a gold mark, or about 23.85 cents in American money. On October 15, 1923, one of the early steps toward the creation of a new currency was taken when provision was made for a rentenmark, which was a currency secured by an enforced lien on certain classes of property in various states and districts of Germany, following the example of Denmark after the Napoleonic wars. At that time, in accordance with the fact, it was provided that one million millions of the old marks should be equal in value to one Rentenmark.

The German courts and the courts of every other country that passed on the question held that old mark contracts entered into prior to the Monetary Act of August 30, 1924, might be discharged by payment of the number of marks, without regard to depreciation, called for by the contract. Since the Monetary Act of August 30, 1924, was enacted, it has been uniformly held by the German courts and other courts that contracts payable in marks made before such legislation was enacted may be discharged by payment in Reichsmarks, the new unit, on the basis of one for each million millions of the old marks, that being the rate of conversion fixed by law.

For a time, in 1922, 1923, and the early part of 1924, some of the subordinate German courts sought to mitigate the hardship thus imposed upon needy creditors by

the application of Section 242 of the German Civil Code, which, translated into English, reads substantially thus:

> "The debtor is obliged to perform in such manner as faith and credit with regard to custom requires."

This provision had been in the German Code for a long time and was not supposed to have any application to contracts which particularly specified the medium in which, and the time when, payment should be made. However, some of the German courts evolved the doctrine that under this provision the terms of the contract might be disregarded and the necessities of one party, the capacity of the other party to pay, the economic conditions of Germany generally, the situation of the parties to the litigation and their dependents, the public interest in the matter, the loss or gain of either party to the obligation, and many other factors, might be considered in determining what the debtor should pay and the creditor should receive.

This obviously impracticable plan broke down and was wholly abandoned in favor of valorization laws which will be hereafter discussed, and which created administrative tribunals with exclusive power to administer and distribute moneys and properties going into the valorization fund.

Of course all classes of creditors suffered alike. Foreign insurance companies transacting business in

Germany, as was appellee, were compelled under German law to keep all of their premium reserves on policies issued to German citizens invested in Germany in German securities ,and these were payable in the same kind of marks as were the policies which they issued.

These matters are discussed in the affidavit of Dr. Burchard (Trans. Rec. 148, et seq.).

As heretofore stated the courts of Germany, and the courts of other countries which passed on the question, held that the extent of the legal right of a creditor under a German mark contract prior to the German Monetary legislation of August 30, 1924, was to recover the number of marks specified in the contract, or, if paid in another country, the exchange value thereof converted into the currency where paid, except insofar as some German subordinate courts for a time, under Section 242 of the German Civil Code above referred to, undertook to give an uncertain and variant relief, not based on the contract, but upon extrinsic considerations not recognized as a basis for recovery by the jurisprudence of other countries.

These statements are fully supported by the following decisions of German courts:

A decision of the Supreme Court handed down April 16, 1921, and reported in the Official Reports of Civil Cases, volume 102, at page 98 (Burchard Aff. Trans. Rec. 157, Ex. "B", Trans Rec. 215, 217).

A decision of the Supreme Court, handed down June

23, 1927, and reported in the Official Reports of Civil Cases in volume 118 at page 370 (Burchard Aff. Trans. Rec. 162, Ex. "D", Trans. Rec. 222, 225).

A decision of the Supreme Court handed down June 6, 1928, and reported vol. 121, p. 203, Official Reports of Civil Cases (Burchard Aff. Trans. Rec. 164, Ex. "E", Trans. Rec. 227). This is a most interesting decision. It discusses the German currency legislation prior to, at the opening of and after the war, and reviews the decisions of the German, English, Norwegian, French, and other courts.

A decision of the Supreme Court handed down January 11, 1922, and reported in Volume 103, at page 384, Decisions of the German Supreme Court (Burchard Aff. Trans. Rec. 167, Ex. "F", Trans. Rec. 233, 235).

A decision of the Supreme Court, rendered December 18, 1920, and reported in Volume 101, at page 141 of the Decisions of the Supreme Court (Burchard Aff. Trans. Rec. 170, Ex. "H", Trans. Rec. 240, 246).

A decision of the Court of Appeals of Berlin, handed down March 12, 1930, in the case of *Messerschmitt v. N. Y. Life* (Burchard Aff. Trans. Rec. 182, Ex. "O", Trans. Rec. 298, 305, 306, 307).

A decision of the Court of Appeals of Berlin, handed down March 12, 1930, in *Hardt v. N. Y. Life* (Burchard Aff. Trans. Rec. 186, Ex. "P", Trans. Rec. 309, 318, 319, 323).

A decision in *Marx v. N. Y. Life,* rendered January 27, 1930 by the Hessian District Court (Burchard Aff. Trans. Rec. 188, Ex. "Q", Trans. Rec. 324, 335).

A decision in the case of *Protective Ass'n of Holders of Foreign Policies v. Swiss Life, etc. Co.,* rendered April 15, 1929, by the Court of Appeals of Munich (Burchard Aff. Trans. Rec. 188, Ex. "R", Trans. Rec. 338, 346, 349, 352).

A decision of the Supreme Court affirming the decision of the Court of Appeals of Munich, supra (Burchard Aff. Trans. Rec. 192, Ex. "S", Trans. Rec. 354, 356, 357, 361).

It will be seen from an examination of these cases that the German courts have uniformly held that insurance contracts payable in the German mark of the old currency, that is, the currency in circulation prior to August, 1924, as well as all other mark contracts, might be discharged by payment of the number of marks called for regardless of their depreciated value; that the German laws did not contemplate anything in the nature of a standard currency; that such contracts contained no guaranty, express or implied, of the stability of the currency; that the policies issued by mutual insurance companies were upon the same footing as other mark contracts, and that statements in policies, prospectuses or other literature to the effect that the reserves and surpluses of a mutual company belonged to all the policyholders, etc., did not give the policyholder

a right to demand or receive more than the number of marks specified in his policy. These, of course, were essentially internal questions concerning which Germany had exclusive power and jurisdiction, and the decisions of its courts defining the rights of its nationals and others domiciled in Germany and transacting business there, under mark contracts, are controlling upon and will be given effect by the courts everywhere.

The Supreme Court of the United States had before it several cases based on contracts payable in the German marks in circulation and constituting the legal tender of Germany prior to the Monetary legislation of 1924; in other words, the marks in which the German insurance policies of appellee are payable.

Deutsche Bank v. Humphrey, 272 U. S. 517, 71 L. Ed. 383, was a suit brought to reach certain property seized and paid into the Treasury by the Alien Property Custodian in satisfaction of a debt payable in German marks. Among other things, the Court said (P. 519):

> "In this case, unlike *Hicks v. Guinness,* 269 U. S. 71, 70 L. Ed. 168, 46 Sup. Ct. Rep. 46, at the date of the demand the German bank owed no duty to the plaintiff under our law. It was not subjct to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. * * * A suit in this country is based upon an obligation existing under the foreign law at the time when the suit was brought, and the obligation is not enlarged by the fact that the creditor happens to be

> able to catch his debtor here. * * * We may assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks, both by the terms of the contract and by the German law — but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Societe des Hotels, etc. v. Cummings* (1922), 1 K. B. 451 - C. A."

In *Sutherland v. Mayer,* 272 U. S. 292, 70 L. Ed. 943, the Court announced the same doctrine.

In *Zimmerman v. Sutherland,* 274 U. S. 253, 71 L. Ed. 1034, the same conclusion was reached concerning an obligation payable in the old currency of Austria-Hungary, which. like the German currency, depreciated in value to the vanishing point and was later superseded by an entirely new currency with a conversion rate fixed by law between the old and the new.

In the case of *Chesterman's Trust* (1923), 2 Chancery, 466, the court had before it a debt payable in Germany in marks which at the time the cause of action accrued had greatly depreciated, and it was held the debt might be paid in the depreciated marks or in

their exchange value converted into British currency. On this basis the debt, which had a gold value when contracted of about 1600 pounds sterling, was held to be payable in marks which had an exchange value of about two pounds.

The same doctrine was applied in *British Bank v. Russian Bank* (1921), 38 T. L. R. 65. It appeared that the British Bank in 1914 borrowed 750,000 roubles, having an exchange value at that time of upwards of 75,000 pounds. Collateral had been deposited by way of security. The action was to redeem the collateral upon payment of the depreciated value of the original loan, or about twenty pounds. This was allowed. The court rejected an appeal to sympathy made by the creditor, Mr. Justice Russell saying that he —

> "Had great sympathy with the defendants, but it must be remembered that the same causes that caused the fall in the value of roubles had produced great depreciation in the plaintiff's securities."

In *Anderson v. Equitable Assurance Society* (1926), 134 L. T. 557, the court had before it an insurance policy taken out in Russia, payable in London in German marks. The court held that the policy did not stipulate payment in standard or gold currency and that the contract might be discharged by paying the number of marks of the kind specified in the policy or their exchange value in British currency, and accordingly a

60,000 mark policy was discharged upon payment of the sum of approximately one shilling.

Decisions of French, Austrian, Jugoslavian and other courts, and by the Tripartite Claims Commission set up in this country, and of which Judge Parker was chairman, are to the same effect:

Credit Lyonnais v. Credit National, Cour d'Appel de Paris, decided Feb. 18, 1927.

Maslova v. Urbaine Life Ins. Co. (4th Chamber, Tribunal of Commerce, Dept. of the Seine), Paris, decided July 19, 1926; reported fol. 156, case 6.

Bauchon v. Credit Lyonnais (1st Chamber, Civil Court), decided Oct. 26, 1925; affirmed by Court of Appeals of Paris, Dalloz Law Reports, June 17, 1927.

Banque Hypothecaire de Bale v. Riegart, Cour de Cassation, decided Jan. 23, 1924; reported in Gazette des Tribunaux April 28-29, 1924.

Banque Hypothecaire v. Riff, decided Jan. 11, 1926, Dalloz L. R. 1926, p. 85.

Ghan v. Orloff, Dalloz L. R. 1927, p. 62.

Decision Supreme Court of Austria, Jan. 18, 1927, Ob. III 993-28 "Zentralblatt" No. 102 ex 1927.

Decision of May 25, 1927, by Tripartite Claims Commission, 21 Am. Journal International Law, 610.

It is not probable that reports of the decisions of the French, Austrian and Jugoslavian courts, supra, are

available to this court. We have in our files copies of the decisions and they will be made available, if desired.

German monetary legislation of August 30, 1924.

On August 30, 1924, Germany enacted a monetary law which created a new and distinct currency, the unit of which is called the Reichsmark. The Reichsmark has a gold value of about twenty-four cents, or substantially the same as the mark prior to the World War. This legislation provided for the conversion of the mark into Reichsmarks at the rate of one million-million of the former to one of the latter, and for the payment of existing mark indebtedness in Reichsmarks at this conversion ratio.

Article 6 of this Act among other things provided:

> "Insofar as a debt may be paid in marks of the former currency, the debtor is entitled to effect the payment on the ratio that one million million marks are equal to one Reichsmark."

On the same date a companion act was passed containing these provisions, among others:

> "The Reichsmark is bound to call up the total amount of old notes in circulation and to exchange them for Reichsmarks. One million million marks of former issues shall be replaced

by one Reichsmark. The redeemed notes shall be destroyed. Detailed regulations for the calling up of the old notes and for the periods of time to be fixed for their delivery and cancellation shall be determined by the directorate of the Reichsbank."

On October 10, 1924, the first decree was promulgated for carrying said legislation into effect and Article I thereof provides that one million million marks of former currencies are equal to one Reichsmark (Burchard Aff. Trans. Rec. pp. 159, 160, Ex. "C", Trans. Rec. p. 219).

The course pursued by Germany in creating a new currency unit and providing for the payment of obligations payable in the old currency by paying a certain number of units of the new currency according to the ratio fixed by law, is not unusual in the history of the world. Following the World War, this course was also adopted by Russia, Austria and Bulgaria.

In *I Sedgwick on Damages,* Sections 267, 268 (9th Ed.), it is said:

"In case of a contract to pay a specified sum of money there is usually no difficulty in estimating the amount to be paid. The monetary system of a country may, however, between the time of the contract and the date of payment, be disturbed and altered in one of two ways: The currency may become depreciated, or a new standard may be adopted. In such cases the contract will be discharged by due payment in any

money which by law is made of equivalent value at the time of payment.

"Where an entirely new standard of value is adopted by the government, the amount to be paid is found by giving such a sum in the new currency as shall be declared by law equal in value to the amount due in the old currency."

Readjustments following the Revolutionary War brought about somewhat analogous conditions. (*Faw v. Marsteller,* 2 Cranch, 10-25; *Robinson v. Noble,* 8 Peters, 181, 189).

In Puerto Rico, after it passed from Spain to this counery, a new currency was established by Act of Congress. The unit of the old currency was a peso of 100 centavos. The law provided that sixty cents of the new currency should equal 100 centavos or one peso of the old, which was the relative exchange or purchasing values of the two currencies at the time of the substitution. Contracts payable in the old currency were made payable in the new at the ratio stated. In *Serralles Successor v. Esbri,* 200 U. S. 103, it was contended that contracts made before the new currency act was passed, but payable or maturing afterwards, could only be discharged by paying in the new currency the number of units thereof called for in the old currency. The court rejected this contention holding in effect that a new currency might be lawfully substituted for an old at the rate of conversion fixed by law.

Construing the monetary legislation of August 30,

1924, and the decrees putting the same into effect, the German courts have uniformily held that, except as to the rights given under the valorization laws, hereinafter discussed, any contract payable in the old mark may be discharged by payment in Reichsmarks at the conversion rate fixed by the legislation. This applies to all mark contracts where the legal relation was entered into prior to February 14, 1924, that is, where the mark contract went into effect prior to that date (Trans. Rec. pp. 306, 316). This is the rule stated and applied in the German decisions cited supra.

The Supreme Court of Germany in its decision of June 23, 1927, reported in Volume 118 of the Decisions of the Supreme Court, page 370, also cited supra, said (Trans. Rec. 162, 222, 226):

> "In this connection the subject matter is represented in the first place by the German laws relating to currency. When those legal provisions underwent alterations, the obligations of the defendant became subject to the altered provisions, as the defendant as well as the creditor, by agreeing upon payment in German currency had subjected themselves to German law. Consequently, Article 6, par. 3 of the Monetary Law of August 30, 1924, applies, according to which the debtor, insofar as a debt can be paid in marks of old currency, is entitled to effect the payment in legal tender in such manner that one million millions of marks is equal to one Reichsmark.
>
> "The question of the revaluation of the old

debt is something entirely different therefrom. In this connection the question of the applicability of German law must also be answered in in the affirmative. The cause of revaluation is the depreciation of the German mark and this question is part of the question as to what does the obligation consist of.

"The amount of a revaluation, if any, cannot be determined in the proceedings in this court."

Concerning this question, Dr. Burchard states (Trans. Rec., p. 162):

"Accordingly, it is now beyond controversy under the law of Germany, that, apart from the question of revaluation which I shall discuss later, old mark debts are payable on the basis that one Reichsmark is equal to one million millions of marks. As the smallest unit of currency now in force is one Reichspfennig, unless an old mark claim amounts to at least 1-100th of one million millions of marks, that it to say, 10,000 millions of marks, it is too small to be paid in any unit of currency in force at present."

Judge Purdy, in a decision of December 11, 1926, in the United States Court in China in the case of *Oliver v. Asia Life Ins. Co.,* gave to the German monetary legislation of August 30, 1924, the same construction that was subsequently given to it by the German Supreme Court. We have not been able to find this decision in any printed report but have in our files a complete copy of the text. The facts were: An insurance policy payable in German marks was issued in China to Oliver. On August

10, 1925, Oliver surrendered the policy and demanded the cash surrender value thereof of 54,800 marks, according to the terms of the policy. He demanded that number of the new Reichsmarks, making the contention that the Reichsmark was the legal tender of Germany at the time he made his demand and that he was entitled to 54,800 units of that currency. In other words, it was his contention that Germany had not created a new currency but that the Reichsmark was the old mark currency under a new name. Judge Purdy apparently falls into the error of assuming that the monetary legislation went into effect in June, 1925. It was put into effect by a decree in October, 1924. This error, however, does not affect his reasoning or conclusions. Among other things, Judge Purdy said:

> "If plaintiff had died on the 30th day of November, 1921, the beneficiary would have received 100,000 German marks which were at that time equivalent, at the then existing rate of exchange between Germany and the United States, to approximately four hundred and eight American gold dollars. From that time on plaintiff's policy of insurance rapidly diminished in value, measured in terms of American gold currency, until on the 14th day of November, 1924, it was worth to his beneficiary, in case of his death, the infinitesimal sum of one-fourth hundred part of one cent in American gold. Its surrender value from November 14, 1924, until June 5, 1925, was 54,800 German marks, which were actually worth to the insured one-seventh hundredth part of one one cent in American money — that is to say, it

required one billion of those marks to equal, at the then existing rate of exchange, 25 cents in our money. If plaintiff had died at any time between November 14, 1924, and June 5, 1925, his beneficiary would have been compelled to accept, in full satisfaction and settlement of defendant's liability, 54,800 German marks, which could have been purchased in the open market practically anywhere in the world for one-seven hundredth part of a cent in American money.

* * * * * *

"This contract, if performance had been required, could have been performed in all good faith by the parties thereto at any time within a year or two prior to the 5th day of June, 1925, and in accordance with its precise terms and spirit, by the payment of a very small fraction of one cent in United States gold, and that too, whether such a performance had been brought about by the death of the insured, or by the surrender of the policy for its cash surrender value in money. By what legerdemain, therefore, did this contract suddenly become worth, after the 5th day of June, 1925, thirteen thousand one hundred and fifty-two American gold dollars? The sole answer to that question is the claim of the plaintiff that upon that day the Republic of Germany abolished this old German paper mark as the legal and lawful currency of that country, and established in lieu thereof a gold mark one billion times more valuable than this old paper German mark with which this contract of insurance had been purchased, * * * and that thereupon this plaintiff had the right to receive

such gold marks in settlement of his claim under this policy. Such a proposition is startling, to say the least, and calls for something than mere sophistry or subtle logic in order to insure its acknowledgment and application by a court of justice.

* * * * * *

"2.— That the German Government had no such intention, with respect to the effect of that law upon its own citizens at home, is clearly shown by the various provisions contained in the law authorizing the retirement of the old paper German mark from circulation. Debts and obligations of Germany's own citizens were not required to be paid and settled for in terms of the new German gold mark — the law having made ample and equitable provision for the valorization of all such existing debts and obligations either under the old currency or according to equitable and just rights of payment and settlement in terms of the new German gold mark.

* * * * * *

"5.— If this identical contract of insurance had been made in Germany as it was made in China, and the plaintiff was now seeking to compel a performance in Germany as he is seeking to compel performance by decree of an American court in China, he would recover nothing, or at most, the value of his marks at the time this insurance policy was offered up for surrender to the defendant.

* * * * * *

"If Germany's currency had become worthless, as a matter of fact this contract of insurance

had also become worthless, and the act of the German Government in putting the old German mark 'out of its misery', had practically no legal effect upon the rights of the parties under this contract."

The case was dismissed upon the ground that the amount which the plaintiff could recover on his contract — but an infinitesimal fraction of one cent — fell within the rule 'de minimus non curat lex'.

The rule announced by Judge Purdy shortly thereafter had the approval of the British Supreme Court for China in the case of *Matteo Bros. v. Sun Life Insurance Co. of Canada* in which the policy involved was payable in Russian roubles. The policy was issued in 1917 just prior to the fall of the Kerensky government. The premiums were fully paid at the time the policy was issued, which matured in 1927. In 1926 the policyholder surrenderd the policy and demanded the cash surrender value and insisted he was entitled to be paid in the new Russian currency of 1926 the same number of roubles called for by the policy, although the old currency had been superceded by a new issue under a law which fixed the value of the old rouble at fifty billion thereof to one unit of the new currency. The court held that the policyholder could only recover on his contract the value of the old rouble at the conversion rate fixed by the Russian currency law of 1926; that the fact that the unit of new currency was called a rouble was quite immaterial and remarked:

"The government might have called their new coinage by the name of Trotsky or Lenin instead of gold rouble. The fact is the rouble of yesterday is not the rouble of today."

German valorization law of July 16, 1925, and enforcement decree of November 29, 1925, discussed.

In the following pages we will show that as to mark obligations falling within the valorization law and decree, which include all German policies of appellee, the only rights and remedies given are those given by the law and the decree; that the German government and appellee, with the approval of the Insurance Department of New York, have agreed upon the basis of valorization of all these policies; that all the German assets of appellee have gone into the valorization fund. These assets include not only all the premium reserves earned on German business, but also the initial deposit of two million marks made when the concession to do business was granted in 1904, the sums provided to meet war losses, amounting to about 11,607,000 marks, and 37,107,737 marks paid to Kronos in 1922 at the time the German business of appellee was taken over by that company. And all those sums were contributed out of assets accumulated from non-German business (Trans. Rec. 454 et seq. In addition, appellee is making a further

contribution of $3,000,000, or about 12,000,000 Reichsmarks out of non-German business (Trans. Rec. 454 et seq.). The administration of this fund, for the benefit of policyholders, and which gives them a great deal more than they would be entitled to under the terms of their policies, is entirely in the hands of the administrative officers, who have a broad discretion and with which the courts have nothing to do.

In this situation it seems clear that this court should not and will not attempt to enforce the rights given under the valorization laws of Germany, which are now the only rights appellant has, and will not seek to interfere with or determine the rights of the appellant in a fund in Germany now being administered by public authority there.

Slater v. Mexican National Railways Co., 194 U. S. 120.

Beyer v. Hamburg Co., 171 Fed. 582.

Schweitzer v. Hamburg Co., 78 Misc. 448; 138 N. Y. Supp. 944.

In The Falco, 15 Fed. (2) 604; Aff. 20 Fed. (2) 362.

The Surstad, 12 Fed. (2) 133.

Verdicchion v. McNab Co., 178 App. Div. 48; 164 N. Y. Supp. 290.

Delaware Co. v. Peck, 225 Fed. 261.

Logan v. Missouri Valley Co., 157 Ark. 528, 537; 249 S. W. 21.

In the Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148; 151 N. E. 159.

Robinson v. Mutual Ins. Co., 182 Fed. 850; Aff. 189 Fed. 347.

On July 16, 1925, Germany enacted what has been referred to in earlier pages as the valorization law (Burchard Aff., Trans. Rec. 171). Copy of material parts of this law are attached to the affidavit as Exhibit "I" (Trans. Rec. 247). On November 29, 1925, a decree or ordinance was promulgated carrying the valorization law into effect (Burchard Aff., Trans. Rec. 172; Ex. "J", Trans. Rec. 249). Among other classes of obligations, there are included within the valorization law and decree insurance contracts issued in Germany prior to February 14, 1924, by appellee and companies under the supervision of the German Insurance Board (Burchard) Aff., Trans. Rec. 177; Sec. 59 valorization law, Trans. Rec. 247; section 95, decree of Nov. 29, 1925, Trans. Rec. 249).

Under the valorization law and decree no general valorization (other than the right to exchange one million million of marks for one Reichsmark) is given. In the case of many classes of old mark contracts no valorization whatever has been provided. Among these are German national, state and municipal bonds, in which practically all the funds and reserves of appellee in Germany were invested. These investments may be regarded as wholly lost, as all appellee can recover is one Reichsmark for each million millions of marks called for by the

obligations. If these should later be rated up, which is unlikely, the policyholders will get the benefit as the obligations are under the control of the German Insurance Board.

The valorization law and decree took nothing from the policyholders. On the contrary, the result is to give them many times more than they would otherwise receive under the terms of their policies.

Under this law and decree holders of German mark insurance policies issued by supervised companies are entitled to the form of valorization therein set up, but not otherwise. Valorization is provided for only under extra-judicial administrative procedure. This is clear from what is said by Dr. Burchard (Trans. Rec. 171, et seq.), and the terms of the valorization law (Burchard Aff. Ex. "I", Trans. Rec. 247), and the decree putting it into effect (Burchard Aff. Ex. "J", Trans. Rec. 249).

Section 115 of the decree putting the valorization law into effect provides that claims against non-supervised foreign insurance companies are excepted from the provisions of the valorization law, or, stated differently, that only insurance policies issued by supervised companies come within the provisions of the law. It was also provided that decision as to whether a foreign insurance company was or was not supervised within the meaning of the valorization law was to be made by the German Insurance Board, and the decision of such Board was to be final and binding upon the courts.

It was not until sometime after the valorization law and decree went into effect that the German Insurance Board decided appellee was a supervised company. In the meantime a number of actions had been brought in the German courts against the appellee and other American insurance companies, and in these actions the courts declined to proceed to judgment until the German Insurance Board had determined which companies were or were not supervised, upon the ground that if a company was supervised its insurance policies fell within the provisions of the valorization laws and the remedies were administrative and not judicial.

On October 25, 1928, the German Insurance Board handed down a decision that the appellee was a supervised company (Burchard Aff., Trans. Rec. 178). A copy of this decision is in the record (Ex. "K", Trans. Rec. 258). An appeal was taken from this decision to the Appellate Division of the German Insurance Board, and on February 13, 1929, the Appellate Division affirmed the decision of the German Insurance Board holding that appellee was a supervised company (Burchard Aff., Trans. Rec. 178). A copy of this decision is in the record (Ex. "L", Trans. Rec. 272).

The decision of the Appellate Division is final and is not open to review by the courts (Trans. Rec. 179).

For some time prior to these decisions of the Insurance Board and Appellate Division, negotiations had been carried on between appellee and the Insurance

Board directly, and also through diplomatic channels, with regard to the contribution which should be made by appellee out of its non-German assets to the valorization fund. The Enforcement Decree of November 29, 1925, in substance provided that if the economic or financial condition of an enterprise made it feasible, then at the demand of the German Insurance Department, such enterprise must pay into the valorization fund certain sums or percentages of its contract obligations from its other property Trans. Rec. 481).

Inasmuch as any contribution made by appellee to the valorization fund must come from reserves in which other policyholders were interested, and would be in a sense extra-legal and beyond the terms of the German insurance contracts, it became necessary to submit the matter to the Insurance Department of the State of New York and secure its approval and consent. After making a study of the whole situation, the Insurance Department of New York declared that any contribution must not infringe on the rights of American and other policyholders, and must be according to some justifiable formula. The formula suggested was that the contribution should be such proportion of the contingent reserve as appellee may have had at the end of 1921 as the reserves on the German business bore to the total reserves of the company at the end of that year. The Insurance Department said that anything beyond this basis would be taking away something rightfully be-

longing to other policyholders and would not be justified (Trans. Rec. 482, 483).

The basis of the contribution thus outlined by the New York Insurance Department was agreed to, both by the appellee and the German Insurance Department, and in its decision of February 12, 1930, the agreement is set down (Buckner Aff., Trans. Rec. 459, et seq.; Ex. "A", Trans. Rec. 479, et seq.). This decision reviews the activities of the appellee in Germany, the conditions during and subsequent to the war, the depreciation of the mark, the enactment of the monetary and valorization laws, and, indeed, the whole pertinent history up to the time the agreement was made and the decision rendered. The Insurance Board pronounced the contribution very satisfactory, remarked that larger contributions would not be compatible with the interests of the other insured of appellee and would not be tolerated by the American supervising authority (meaning the Insurance Department of New York) and pointed out that it increased by about seven-fold the amounts the policyholders would receive (Trans. Rec. 480, 484, 492).

Notice was taken of the claims of some of the policyholders that because appellee was a mutual company and there were statements in its policies, prospectuses, and other literature that its surpluses belonged to all of its policyholders, etc., some rule of liability should be applied different from that applicable to non-mutual

companies. These contentions were rejected (Trans. Rec. 486, 487).

The same question was before the German courts and ruled adversely to the policyholders in:

Hardt v. N. Y. Life Ins. Co., supra (Burchard Aff., Trans. Rec. 186; Ex. "P", Trans. Rec. 309, 318).

Protective Ass'n, etc. v. Swiss Life, etc. (Burchard Aff., Trans. Rec. 188; Ex. "R", Trans. Rec. 338, 342, 347, 349; and

Decision by the Surpeme Court of Germany on February 21, 1930, affirming the aforesaid decision (of the Munich Court of Appeals), (Burchard Aff., Trans. Rec. 188, 192; Ex. "S", Trans. Rec. 354, 360); and *Messerschmitt v. N. Y. Life,* Supra (Burchard Aff., Trans. Rec. 182; Ex. "O", Trans. Rec. 298), in which the Court said (Trans. Rec. 307, 308):

> "The plaintiff, who, obviously, himself feels this to be true, has not tried to support his claim by contending that the defendant, at the conclusion of the contract, had promised to him that the insurance money, and/or the redemption amount, would be of stable value, and that the defendant had guaranteed to him that he would not suffer any losses from fluctuation of rates and/or depreciation of currency. The policy which, at least, may be assumed to contain a complete reproduction of the total contract, does not, however, contain anything in support of this (the plaintiff's) view. The defendant's quality of

> a 'pure mutual company' cannot, likewise, be turned to account for this, as it would not in the least alter the fact of the insurance being a mark insurance falling under German law. In the propaganda and prospectus letters, cited by the plaintiff, neither, nothing is said anywhere about a guarantee being given by the defendant with regard to losses caused by fluctuations of rates or depreciation of currencies. These propaganda and prospectus letters have merely the tendency to show off the defendants as an undertaking spread all over the world and being most particularly secure and solvent. In this regard, for the rest reference can be made to the argumentation of the Judge of the First Instance. The annual reports and balance sheets of the defendant, drawn up and published by the defendant in Germany, neither do allow to draw any conclusion with regard to such (alleged) agreement concerning the stability of the insurance money and a guarantee against losses caused by fluctuations of rates and/or depreciation of currencies."

Since the valorization statute and decree went into effect it has been held by all of the German courts passing on the question, including the Supreme Court, that actions cannot be maintained on policies falling within their provisions. This includes the policies involved in this action, as well as all policies involved in the cases pending in the Oregon courts. In other words, outside of valorization, the holder of a German mark policy issued prior to February 14, 1924, may recover only the value of the number of old marks called for by

his contract at the legal rate of conversion of one Reichsmark for one million million of old marks, and his rights under the valorization law and decree are in a fund under the control of the German insurance authorities with which the courts have nothing to do.

We now refer to a few of the many decisions of the German courts to this effect.

In *Schroter v. Alte Gothaer Lebensversicherungsbank,* decided June 8, 1928 (Buchard Aff., Trans. Rec. 180; Ex. "M", Trans. Rec. 283, 289), the Supreme Court said:

> "The judgment appealed against does not show any misconception of the principles of law in so far as it rejects the claim because of the inadmissibility of ordinary proceedings. Under Articles 59, et seq. of the German Revaluation Act, in connection with Article 107 of the Enforcement Ordinance of 29th November, 1925, the revaluation of claims based on life insurance policies takes place in a special procedure to the exclusion of ordinary proceedings in courts.
>
> * * * * * *
>
> "Since, in conformity with the view of the court below, it appears that no judicial proceedings are admissible, the appeal from the decision of the court below is dismissed."

Frensdorff nee Herz v. Swiss Life Assurance Annuity Institute, decided by the Supreme Court of Germany December 13, 1929 (Burchard Aff., Trans. Rec. 181; Ex. "N", Trans. Rec. 291, 292, 293, 297). The

court held that the policy was governed by German law; that the only policies excluded from the application of the valorization law and decree were those issued by foreign insurance companies not subject to the supervision of the German Insurance Board; that it was immaterial that the policy was issued prior to the time the company became subject to supervision; that the only remedies were those under the valorization law and decree, and that no action could be maintained in the courts.

Messerschmitt v. New York Life Insurance Company, decided by the Berlin Court of Appeals March 12, 1930 (Burchard Aff:, Trans. Rec. 182; Ex. "O", Trans. Rec. 298, 305). The Court rejected the contention that a different rule would apply to mutual companies than to non-mutual companies. Among other things the Court said (Trans. Rec. 183-185):

> "The Senate proceeds from the view that the contractual relations of the parties are governed by German law. The contract has been concluded in Germany. The application and the policy are in the German language. The plaintiff was, and is still, a German national, and residing in Germany. The policy was executed, for and in behalf of the defendant, also by its chief representative for Germany. The amount of the insurance money and premiums, both payable in Germany, are expressed in mark-currency; the jurisdiction of the Berlin courts is agreed upon. Considering all this, there can not be the least doubt that the parties had in view — and that it

was their intention — that German law should govern. * * * As to the laws to govern in cases of conflict of laws, in the first place the consensus of intention of the parties, and after that also the place of performance are of decisive importance. Both show in the present case, no doubt, that German law should govern. * * *

"In keeping with this intention of the parties at the conclusion of the contract was also the manner in which the policy has been dealt with thereafter. It was from the beginning kept with the German insurance stock of the defendant; a premium reserve was constituted for it in accordance with the provisions of the pertinent German laws. The policy is undisputedly included in the trustee procedure.

"Having regard of all this, there cannot be the least doubt, when considering the terms and conditions of the insurance contract as laid down in the policy, that the claim concerned herein is a claim arising from a life insurance contract within the meaning of sections 59, et sequ., of the German Revaluation Act and Article 95 of its Enforcement Ordinance respectively, and that this claim arises from a legal relationship entered into prior to February 14, 1924, and that it has for its object the payment of a definite sum expressed in German marks, section 1 of the Revaluation Act and Art. 95 of the Enforcement Ordinance. It is undisputed and a matter of judicial notice that the defendant is a supervised company within the meaning of Article 115 of the Enforcement Ordinance; the German Insurance Department has finally and conclusively de-

cided this to be the case. This decision is binding upon the court.

"Consequently, inasmuch as a revaluation of a mark-claim is involved herein, only revaluation by means of the trustee procedure can take place; such claim must be directed against the trustee; the defendant is not the proper party to be sued therefor. Insofar as the plaintiff in the present proceedings tries particularly to prosecute a claim against defendant based on 'discretionary' revaluation, his claim must be dismissed, because no such claim exists."

See also to the same effect:

Hardt v. New York Life Insurance Co., decided by the Berlin Court of Appeals on March 20, 1930 (Burchard Aff., Trans. Rec. 186; Ex. "P", Trans. Rec. 309, 318, 323).

Marx v. New York Life Insurance Co., decided by the Hessian District Court, January 27, 1930, is to the same effect (Burchard Aff., Trans. Rec. 188; Ex. "Q", Trans. Rec. 324).

Protective Ass'n of Holders of Foreign Insurance Policies v. The Swiss Life, by the Court of Appeals of Munich in its decision of April 15, 1929, in which the question is elaborately discussed (Burchard Aff., Trans. Rec. 188; Ex. "R", Trans. Rec. 338, 345, 352).

The last mentioned decision was affirmed by the Supreme Court of Germany on February 21, 1930

(Burchard Aff., Trans. Rec. 188; Ex. "S", Trans. Rec. 354).

Daunert v. The Guardian Life, decided by the Berlin Court of Appeals July 11, 1928 (Burchard Aff., Trans. Rec. 192; Ex. "T", Trans. Rec. 363, 365).

Other decisions to the same effect are mentioned and reviewed by Dr. Burchard (Trans. Rec. 194, et seq.).

We will conclude this phase of the argument by quoting the following from the affidavit of Dr. Burchard (Trans. Rec. 204):

> "In concluding this portion of my affidavit, I wish to point out that no German court, in any of the hundreds of actions prosecuted before those courts, seeking an adjudication of the claims of the former German policyholders of New York Life Insurance Company, has ever awarded a recovery in Reichsmarks upon the principal or main amount of such insurance; in all those actions, wherever a decision has been rendered, the German courts have in effect, as has been indicated from the decisions I have heretofore cited, relegated the claimant to proceedings under the Revaluation Act, or have suspended the legal proceedings until a decision upon the question of supervision should be rendered by the German Insurance Board, with the obvious intention as indicated in the foregoing decisions, and as has actually been done in some of the aforementioned actions, of thereafter dismissing the action and

relegating the claimant to proceedings under the Revaluation Law, should such decision be to the effect of the decision handed down, that New York Life is a supervised company within the meaning of such laws.

"Unless revalued, of course, such a judgment would obviously be not worth entering, because of the conversion ratio fixed by the Coinage Laws of 1924, of one million millions of old marks for one Reichsmark.

"I wish to reiterate and emphasize that no German court has ever awarded recovery upon the basis that a debt or obligation contracted in or calling for the payment of marks of the old mark currency entitled the creditor to receive or recover in payment Reichsmarks of the currency established by the legislation of August 30, 1924, upon the basis that one mark of the old currency was equal to one Reichsmark, or upon any basis (except under the Revaluation Law) other than that one Reichsmark is equivalent to one million millions of the old mark currency. That such is established German law is confirmed by the decision of the Supreme Court of Germany of June 23, 1927, reported in Volume 118, of the official reports of decisions of the Supreme Court, p. 370, et seq. (See p. 12, et seq., of this affidavit Exhibit "D" hereto attached; also p. 29, et seq., of this affidavit, and Exhibits 'R' and 'S' hereto attached.)

"These are similar to numerous other decisions of the German courts. So established is this construction of the German law that since this said decision of the Supreme Court of June 23, 1927, I do not think any German lawyer could be

found who would present to any German court the contention that, aside from revaluation, under the Revaluation Law and the Enforcement Ordinance or decree of November 29, 1925, and through the administrative machinery there set up, debts or other obligations contracted or expressed in or calling for payment in marks of the old currency entitle the creditor to payment in Reichsmarks except on the basis that one Reichsmark is equivalent to one million million marks of the old currency."

The only matter left unsettled by the earlier decisions of the subordinate German courts was whether or not accumulated dividends on policies were definite sums within the meaning of the valorization law and decree. Of course, if accumulated dividends were not within the valorization laws as to supervised companies, such as the appellee, there could be no valorization of such claims, and the creditor would be entitled to recover only the actual value of his accumulated dividends at the conversion ratio of one million million marks to one Reichsmark. At the time Dr. Burchard made his first affidavit, verified on May 9, 1930, he referred to the fact that the subordinate courts were in disagreement on this question. Shortly thereafter that question came squarely before the Supreme Court of Germany in the case of *Moritz Gross v. New York Life Insurance Company,* decided May 27, 1930, and this decision is discussed in the supplemental affidavit of Dr. Burchard (Trans. Rec. 502), and a copy of the decision is attached as Exhibit "A", (Trans. Rec. 508).

The court held that no distinction should be made between the face or principal sum of the policy and accumulated dividends, and held that both were insurance claims for definite sums within the meaning of the valorization law and decree. Therefore it is now settled by said decision that all claims arising on any of appellee's German policies are exclusively subject to the valorization law and decree and to the administrative jurisdiction of the German insurance authorities.

It is respectfully submitted that the judgment from which the appeal is taken should be affirmed.

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